164-702

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 485.

MAX COHEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED APRIL 11, 1896.

(16,250.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 24, 1896.

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1 THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a district court of the United States for the district of Maryland, begun and held at the city of Baltimore on the first Tuesday of December, being the third day of the same month, in the year of our Lord one thousand eight hundred and ninety-five—present, the Honorable Thomas J. Morris, judge of the Maryland district; William L. Marbury, Esq., attorney; Charles H. Evans, Esq., marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

THE UNITED STATES }
vs. }
MAX COHEN. }

Be it remembered that on the third day of February, anno Domini 1896, the grand inquest, who, being empaneled, sworn, and charged to enquire for the United States of America for the body of the district aforesaid, having withdrawn from the bar of the court here, afterwards presented to the court the following presentment, to wit:

2 *Presentment.*

UNITED STATES OF AMERICA, } *sct:*
District of Maryland, }

In the District Court of the United States for the Maryland Dist., December Term, 1895.

The grand inquest of the United States of America, inquiring for the body of the district of Maryland, do on their oath present that Max Cohen heretofore, to wit, on the 4th day of March, A. D. 1895, did unlawfully and corruptly devise a scheme and artifice to defraud divers persons, the same to be effected by opening correspondence with such persons by means of the Post-office establishment of the United States, contrary to the act of Congress in such cases made and provided.

GEO. A. POPE, *Foreman.*

Witnesses: Wm. J. Maxwell, Albert Day, Charles C. Crooks, Douglas H. Duer, Charles Cugle, E. D. Loane, Jr., A. L. Cline, George Shaw.

Whereupon the United States of America, by William L. Marbury, Esq., attorney of the said United States for the district of Maryland, exhibited to the said grand inquest now here empaneled, sworn, and charged to enquire, etc., an indictment against the said Max Cohen in form following, to wit:

3 *Indictment.*

THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

In the District Court of the United States in and for the District of Maryland.

The grand inquest of the United States of America in and for the district of Maryland, inquiring for the body of said district, do on their oath present that Max Cohen, late of said district, yeoman, heretofore, to wit, on the fourth day of March, in the year of our Lord one thousand eight hundred and ninety-five, at Baltimore city, in the district aforesaid, had unlawfully and corruptly devised a scheme and artifice to defraud divers persons, which scheme and artifice was of the following character and description, to wit: He, the said Max Cohen, then and there intended to obtain from divers manufacturers and merchants divers articles of merchandise, to be sent by said manufacturers and merchants to a certain Richard D. Uhthoff, whom the said Cohen falsely represented to be an importer, exporter, and jobber and a dealer in wholesale supplies for factories, dealers, etc.: the said articles of merchandise to be obtained from the manufacturers and merchants aforesaid by the false pretence made to them by the said Max Cohen that they should be paid for the same by the said Richard D. Uhthoff, he, the said Max Cohen, then and there well knowing and believing that the
4 said manufacturers and merchants would not in truth and fact be paid by the said Uhthoff, and then and there contriving and intending fraudulently to convert the said articles of merchandise to his own use and profit.

And the grand inquest aforesaid on their oath aforesaid do further present that the aforesaid scheme and artifice to defraud was to be effected by opening correspondence and communication with the manufacturers and merchants aforesaid by means of the Post-office establishment of the United States and by inciting the manufacturers and merchants aforesaid to open communication with him, the said Max Cohen.

And the grand inquest aforesaid on their oath aforesaid do further present that the said Max Cohen, devising and intending to defraud in the manner aforesaid the Davis & Stevens Manufacturing Company, in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "The Davis & Stevens Manf. Co., Seneca Falls, N. Y.," to be sent and delivered by the said Post-office establishment; which said letter is of the following tenor, to wit:

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Mar.* 5, 1895.

The Davis & Stevens Manf. Co., Seneca Falls, N. Y.

GENTS: Kindly hurry order sent you & oblige,
Yours truly,
R. D. UHTHOFF.
M."

5 And the grand inquest aforesaid on their oath aforesaid do further present that the said Max Cohen, devising and intending to defraud in the manner aforesaid the Turner, Day & Woolworth Manufacturing Company, in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louisville, Ky.," to be sent and delivered by the said Post-office establishment; which said letter is of the following tenor, to wit:

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *July* 6, 1895.

Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louisville, Ky.

GENTLEMEN: Yours of recent date at hand; also price-list enclosed.

Please send at once, via fast freight, the following as a trial order:

6 doz. 36-inch turned hickory axe handles (extra),
6 " " " " (excelsior),
6 " " " " (# 1),
6 " " " " (# 2),
6 " " " " (# 3),

and oblige,
Yours truly,
R. D. UHTHOFF.
M.

Dic. by M. C."

6 And the grand inquest aforesaid on their oath aforesaid do further present that the said Max Cohen, devising and intending to defraud in the manner aforesaid the Wrightsville Hardware Company, in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "Wrightsville Hardware Co., Wrightsville, Pa.," to be sent and de-

livered by the said Post-office establishment; which said letter is of the following tenor, to wit:

" Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Jul-* 10, 1895.

Wrightsville Hardware Co., Wrightsville, Pa.

GENTLEMEN: Shipment at hand O K.
Please send at once vi- same route—
3 gross # 600 hammers,
2 " # 250 "
2 " " 1 "
and oblige,
Yours truly,

R. D. UHTHOFF.
M.

Dic. by M. C."

contrary to the statute of the United States in such case made and provided and against the peace, government, and dignity of the United States.

WILLIAM M. MARBURY,
Attorney of the United States for the District of Maryland.

7 Whereupon the said grand inquest, having retired from the bar of the court here to enquire concerning said indictment, afterwards returned the said indictment to the court here endorsed, to wit: "A true bill. George A. Pope, foreman."

And whereas, said cause coming to be tried, said Max Cohen, by his attorney, comes into court here and demurs to said indictment in the words following, to wit:

THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

UNITED STATES *vs.* MAX COHEN. } In the District Court of the United States for the District of Maryland.

The said Max Cohen says that the said indictment and the matters therein contained and each of the counts of said indictment and the matters therein contained are not sufficient in law, and that he is not bound to answer the same, and this he is ready to verify.

Wherefore he prays judgment.

WM. COLTON,
Att'y for Max Cohen.

8 And the attorney for the traverser and for the United States having been heard on the said demurrer and the court

having considered the same, it is thereupon ordered that the demurrer be overruled.

Whereupon the traverser pleads "not guilty" thereof and puts himself upon the country.

9 Whereupon, on the 4th day of February, 1896, a jury to try the issues joined in the cause aforesaid was empaneled and sworn as follows, to wit: Uriah A. Pollack, Francis Albert, W. Edward Paul, William D. Randall, Lewis H. Hill, John S. Reese, James F. Curley, William H. Jones, Robert Murray, George G. Hayden, James H. Downs, and James A. Brannan.

And the said persons so being empaneled and sworn to say the truth in the premises upon their oath do say that the said Max Cohen *in* "guilty" as charged in the indictment aforesaid.

Wherefore it is considered by the court here that the said Max Cohen be imprisoned in the Maryland penitentiary for and during the term of eighteen months and to pay a fine of $500; and the said Max Cohen is committed to the custody of the marshal of the district aforesaid, to be taken and delivered to the custody of the warden of the Maryland penitentiary, there to be kept in safe custody, etc.

MEMORANDUM.—Verdict was rendered on the 7th day of February, 1896. Same day sentenced.

And afterwards, to wit, on the 24th day of February, 1896, the said Max Cohen, by his attorney, presented to the court his bill of exceptions, and the court signed and sealed the same, to wit:

Bill of Exceptions.

10 MAX COHEN.

First bill of exceptions.

At the beginning of the trial of this cause the court, against the objection and protest of the defendant, ordered, directed, and required that the indictment in this cause and that against Richard D. Uhthoff, which was of tenor as follows, be tried at the same time before the same jury:

11 THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

In the District Court of the United States in and for the District of Maryland.

The grand inquest of the United States of America in and for the district of Maryland, inquiring for the body of said district, do on their oath present that Richard D. Uhthoff, late of said district, yeoman, heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-five, at Baltimore city, in the district aforesaid, had unlawfully and cor-

ruptly devised a scheme and artifice to defraud divers persons, which scheme and artifice was of the following character and description, to wit: He, the said Richard D. Uhthoff, falsely pretending and assuming to be an importer, exporter, and jobber and a dealer in wholesale supplies for factories, dealers, et cetera, did then and there fradulently and corruptly intend and propose to order and obtain from divers manufacturers and merchants divers articles of merchandise, falsely pretending that he would pay for the same, he, the said Richard D. Uhthoff, then and there not intending in truth and fact to pay the said manufacturers and merchants for the articles of merchandise aforesaid, but intending to fraudulently and corruptly convert the said articles of merchandise to his
12 own use and profit; which said scheme was then and there to be effected by him, the said Richard D. Uhthoff, by opening correspondence and communication with the manufacturers and merchants aforesaid by means of the Post-office establishment of the United States.

And the grand inquest aforesaid on their oath aforesaid do further present that the said Richard D. Uhthoff, devising and intending to defraud in the manner aforesaid the firm of Radcliffe & Shaw, in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "Messrs. Ratcliffe & Shaw, Glen Rock, Pa., York Co.," to be sent and delivered by the said Post-office establishment; which said letter is of the following tenor, to wit:

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 14, 1895.

Messrs. Ratcliffe & Shaw, Glen Rock, Pa.

GENTLEMEN: Please send at once via same route—
4 coils $\frac{1}{4}$ jute.
4 " $\frac{5}{16}$ "
4 " $\frac{3}{8}$ "
and hurry same through as quickly as possible and oblige,

Yours truly, R. D. UHTHOFF.

Dic. by M. C."

13 And the grand inquest aforesaid on their oath aforesaid do further present that the said Richard D. Uhthoff, devising and intending to defraud in the manner aforesaid the Turner, Day & Woolworth Manufacturing Company, in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city, a certain letter

addressed to "Turner, Day & Woolworth Mfg. Co., Louisville, Ky.," to be sent and delivered by the said Post-office establishment; which said letter is of the following tenor, to wit:

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 6, 1895.

Turner, Day & Woolworth Mfg. Co., Louisville, Ky.

GENTLEMEN: Please hurry our order of July 15th and oblige, yours truly,

Yours truly,

R. D. UHTHOFF."

And the grand inquest aforesaid on their oath aforesaid do further present that the said Richard D. Uhthoff, devising and intending to defraud in the manner aforesaid the Davis & Stevens Manufacturing Company, in and for executing the said scheme and artifice
14 unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.," to be sent and delivered by the said Post-office establishment; which said letter is of the following tenor, to wit:

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Feb.* 27, 1895.

The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.

GENTS: Pumps to hand yesterday, but you neglected to put valve tips on 18 of the rubber tubes.

Please send at once, via same route, four (4) dozen #2 Cyclone pumps same as last. Kindly be careful & not omit valve tips for tubes, as above stated, & also send 18 for above, where they were left off, & oblige,

Yours truly,

R. D. UHTHOFF."

contrary to the statute of the United States in such case made and provided and against the peace, government, and dignity of the United States.

WILLIAM L. MARBURY,
Attorney of the United States for the District of Maryland.

15 And the court accordingly proceeded to try the indictment against this defendant and the said indictment against said

Uhthoff at the same time and before the same jury; for which action and ruling of the court the defendant then and there prayed leave to except.

Second Bill of Exceptions.

After the matters set forth in the aforegoing or first bill of exceptions, which is hereby incorporated in and made part of this the second bill of exceptions, the prosecution called JOHN SHAW, who testified substantially as follows:

That he is a member of the firm of Radcliffe & Shaw, manufacturers of jute, rope, and twine, at Glen Rock, Pa., and that said firm in the month of August, 1895, received and executed orders for goods, as per the following letters produced by said witness and herewith by the court permitted to be read in evidence, in regard to which letters the witness stated: "There are three of them, the first dated August 9, and I received that on the morning of the 10th from the post-office at Glen Rock," said witness also producing the following envelopes with the marks and addresses thereon following: "R. D. Uhthoff, Baltimore, Md.," in upper left-hand corner; postmarked "Baltimore, Md., Aug. 3, 7 p. m., '95," and "Glen Rock, Pa., Aug. 5, 1895, 6 a. m.," and addressed "Messrs. Ratcliffe & Shaw, Glen Rock, York Co., Pa." "R. D. Uhthoff, Baltimore, Md.,'" in upper left-hand corner; postmarked "Baltimore, Md., Aug. 12, '95, 6.30 p. m.," and "Glen Rock, Pa., Aug. 13, 1895, 6 a. m.," addressed "Messrs. Radcliffe, Shaw & Co., Glen Rock, Pa." "R. D. Uhthoff, Baltimore, Md.," in upper left-hand corner; postmarked "Baltimore, Md., Aug. 14, '95, 12 p. m.," and "Glen Rock, Pa., Aug. 15, 1895," addressed "Messrs. Ratcliffe & Shaw, Glen Rock, York Co., Pa."

16 Which envelopes enclosed the following letters, subsequently shown to be in Uhthoff's handwriting:

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed — 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 3, 1895.

Messrs. Ratcliffe & Shaw, Glen Rock, Pa.

GENTLEMEN: Please send catalogue and discounts on your ropes, twines, and cordage and oblige,

Yours truly, R. D. UHTHOFF."

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 9, 1895.

Messrs. Ratcliffe & Shaw, Glen Rock, Pa.

GENTLEMEN: Your favor of the 5th inst. at hand.

Please send at once, via fast freight, the following as a sample order and bill same, with your best discounts:

1 coil $\frac{1}{4}$ "jute,"
1 " $\frac{5}{16}$ "
1 " $\frac{3}{8}$ "
1 " $\frac{1}{2}$ "
1 " $\frac{3}{4}$ "

17 and oblige,
Yours truly,
R. D. UHTHOFF.

Dic. by M. C."

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 12, 1895.

Messrs. Radcliffe, Shaw & Co., Glen Rock, Pa.

GENTLEMEN: Please send catalogue, price-list, and discounts on your cordage, etc., and oblige,
Yours truly,
R. D. UHTHOFF."

"Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 14, 1895.

Messrs. Ratcliffe & Shaw, Glen Rock, Pa.

GENTLEMEN: Please send at once, via same route—

4 coils $\frac{1}{4}$ jute,
4 " $\frac{5}{16}$ "
4 " $\frac{3}{8}$ "

18 and hurry same through as quickly as possible and oblige,
Yours truly,
R. D. UHTHOFF.

Dic. by M. C."

" Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 22, 1895.

Messrs. Radcliffe & Shaw, Glen Rock, Pa.

GENTLEMEN: Jute rope at hand O K, with the exception that we ordered 4 coils $\frac{1}{4}$, 4 coils $\frac{5}{16}$, and 4 coils $\frac{3}{8}$. The lot we received today was only 15 coils, one coils being short; however, as the lot corresponds with invoice, presume you were short.

Please send at once—

8 coils of $\frac{5}{16}$ jute rope,
4 " $\frac{3}{8}$ "
4 " $\frac{1}{4}$ "

same as last, and bill at same figures, and oblige,

Yours truly, R. D. UHTHOFF.

Dic., S. G."

19 To the admissibility of which letters and envelopes the defendant then and there, as they were severally offered, objected; but the court overruled the objection and allowed said letters to be read in evidence; to which action and ruling of the court the defendant then and there prayed leave to except.

Third Bill of Exceptions.

After the matters set forth in the foregoing or second bill of exceptions, which is hereby incorporated in and made part of this the defendant's third bill of exceptions, the prosecution called ALBERT DAY, who testified that he is the president and general manager of the "Turner, Day & Woolworth Manufacturing Company," which is a body corporate, chartered under the laws of the State of Kentucky, doing business at Louisville, in said State, and that the letters hereinafter named were received at said last-mentioned place from the postal letter-carrier and opened by him, and goods shipped as per orders therein contained, the witness stating, They came—the first one there came through our New York office; that was a request for quotation of prices. These came all in the usual course of mail, direct to Louisville, witness stating envelopes were destroyed; handwriting of letters subsequently shown to be that of R. D. Uhthoff.

"Jobber in hardware & household specialties; supplies for factories, offices, stores, etc.	R. D. Uhthoff, jobber & manufacturers' ag't.	Patent fire & burglar proof safes, locks, etc.

Removed to 106 Hanover St.

BALTIMORE, MD., *Jun-* 21, 1895.

Wm. R. McCullough, Esq., New York, N. Y.

20 DEAR SIR: Please send catalogue, price-list, and discounts on your handles and oblige—

Yours very truly, R. D. UHTHOFF."

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Jun-* 28, 1895.

Turner, Day & Woolworth Mfg. Co., New York, N. Y.

GENTLEMEN: Please send catalogue, price-list, and discounts on your handles and oblige—

Yours truly, R. D. UHTHOFF.

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *July* 6, 1895.

Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louisville, Ky.

GENTLEMEN: Yours of recent date at hand; also price-list enclosed.

21 Please send at once, via fast freight, the following as a trial order:

6 doz. 36-inch turned hickory axe handles (extra).
6 " " " " (Excelsior).
6 " " " " (# 1).
6 " " " " (# 2).
6 " " " " (# 3).

and oblige,

Yours truly, R. D. UHTHOFF.
M.

Dic. by M. C.

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Jul-* 15, 1895.

Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louisville, Ky.

GENTLEMEN: Shipment of axe handles at hand O K. Please send at once, via same route—

10 doz. ex. 32-inch axe handles,
10 " Excelsior "
10 " #1 "
10 " #2 "
10 " #3 "

and oblige,

Yours truly, R. D. UHTHOFF.
M.

Dic. by M. C.

22

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Aug.* 6, 1895.

Turner, Day & Woolworth Mfg. Co., Louisville, Ky.

GENTLEMEN: Please hurry our order of July 15th and oblige, yours truly,

Yours truly, R. D. UHTHOFF.

To the admissibility of which letters, said witness having further stated that he recollected no post-marks upon any of them, the defendant then and there, as they were severally offered, objected, but the court overruled the objections and allowed said letters to be read in evidence; to which action and ruling of the court the defendant then and there prayed leave to except.

Fourth Bill of Exceptions.

After the matters set forth in the aforegoing or third bill of exceptions, which is hereby incorporated in and made part of this the defendant's fourth bill of exceptions, the prosecution called WM. F. FOCKE, who testified that the place of business of the defendant and Richard D. Uhthoff was located during the year 1895 at No.
23 106 Hanover street, Baltimore, on the second floor of the building just designated, he (witness) having his place of business on the first floor of the same building, and said witness, in answer to the question "How much the defendant Uhthoff was in his office" was permitted to state, against the objection of the de-

fendant, then and there made when said testimony was offered, "I cannot say how often Mr. Uhthoff or Mr. Cohen has been in his office, but I can say that there has been a great many people called at my office to inquire for him," the defendant Uhthoff; to which action and ruling of the court the defendant then and there prayed leave to except.

Fifth Bill of Exceptions.

After the matters set forth in the foregoing or fourth bill of exceptions, which is hereby incorporated in and made part of this the defendant's fifth bill of exceptions, the prosecution called FRANK N. STEVENS, who testified that he is the treasurer of the Davis & Stevens Manufacturing Company, which is a body corporate, chartered under the laws of the State of New York, doing business at Seneca Falls, in the State of New York, and that he received the following letters "through the United States mail in the regular course of our business;" envelopes stated to be most always destroyed, but would not say positively the Uhthoff envelopes were destroyed; which were allowed to be read in evidence against the objection of the defendant, then and there made by the defendant as said letters were severally offered:

24

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Feb.* 4, 1895.

The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.

GENTS: Please send catalogue, disc., & terms on your Cyclone pumps & oblige,

Yours truly, R. D. UHTHOFF.

Answered Feb. 6, '95.

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Feb.* 7, 1895.

The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.

GENTS: Yours to hand. Please send—
6 dozen Cyclone # 2 pumps at once & oblige,

Yours truly, R. D. UHTHOFF.

25

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Feb.* 18, 1895.

The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.

GENTS: Please hurry up order sent you Feb. 7th and oblige,

Yours truly, R. D. UHTHOFF.

Answered.

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Feb.* 27, 1895.

The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.

GENTS: Pumps to hand yesterday, but you neglected to put valve tips on 18 of the rubber tubes.

Please send at once, via same route, four (4) dozen # 2 Cyclone pumps same as last. Kindly be careful & not omit valve tips for tubes, as above stated, & also send 18 for above where they were left off & oblige,

Yours truly, R. D. UHTHOFF.

26

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Mar.* 5, 1895.

The Davis & Stevens Manf. Co., Seneca Falls, N. Y.

GENTS: Kindly hurry order sent you & oblige,

Yours truly, R. D. UHTHOFF.
M.

Q. Did you make any efforts at that time to sell your pumps to dealers?

(Objected to. Objection overruled and exception noted by Mr. Colton.)

Q. Please state what your experience was in attempting to sell your pumps.

A. My experience was this: I entered two different stores here in the city to try to sell our goods, and in one store I was met with the statement that they could purchase the goods cheaper, and they exhibited to me the goods which we manufacture and of which we had never sold any to any other parties in Baltimore than Mr. Uhthoff. I was met with that statement, that they could buy them

cheaper than we could sell them to them, and the price at which they bought them I remember I knew to be below what they could be manufactured for; just what that price was I cannot state.
27 In another store I was shown the goods we are manufacturing, which were a hand pump—a little hand pump—and the person stated that they were left in his possesion, and he had to pay cash for them, and he bought them for 5 cents apiece, while we couldn't manufacture them for less than 12 cents apiece.

Q. To whom did you sell these hand pumps?

A. The hand pump, I cannot say to whom we sold them, because they have been sold to different parties.

Q. In Baltimore?

A. Yes, sir.

Q. What is the retail price for them?

A. The retail price varies from 20 to 50 cents; generally from 25 to 30 cents.

To which several actions and rulings of the court the defendant then and there prayed leave to except.

Sixth Bill of Exceptions.

After the matters set forth in the aforegoing or fifth bill of exceptions, which is hereby incorporated in and made part of this the defendant's sixth bill of exceptions, the prosecution called H. B. BERNSTOCK, to the competency of which witness, his name not being on the list of witnesses on the indictment, the defendant objected, but the court overruled the objection and allowed said witness to testify. Said witness then testified that he is the book-keeper of the Wrightsville Hardware Company, which is a body corporate, chartered under the laws of the State of Pennsylvania and doing
28 business at Wrightsville, York county, in said State, and produced the following letters, afterwards shown to be in Uhthoff's handwriting, said letters being received by United States mail and goods ordered therein shipped to Uhthoff at address given therein, of which the envelopes enclosing them had been destroyed; and said letters, against the objection of the defendent, then and there made as they were severally offered, were allowed to be read in evidence:

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *May* 18, 1895.

Wrightsville Hdw. Co., Wrightsville, Pa.

GENTS: Your postal, also catalogue with discount sheet enclosed, at hand. Please send at once, via fast freight, the following as a trial order & bill same with your best discounts:

1 gross # 1 shingling hatchets, polished,
1 " " 600 nail hammers,
1 " " 250 Ladies' Pride hammers,
1 " " 254 handy "
& oblige,
Yours truly, R. D. UHTHOFF.
M.

29

Importer, exporter, and jobber. R. D. Uhthoff, importer and jobber. Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Jun-* 12, 1895.

Wrightsville Hardware Co., Wrightsville, Pa.

GENTS: Shipment at hand O K. Please send at once, via same route, the following:
2 gross # 600 hammers,
2 " " 250 "
1 " " 254 "
1 " " 1 hatchets,
and oblige,
Yours truly, R. D. UHTHOFF.

Importer, exporter, and jobber. R. D. Uhthoff, importer and jobber. Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Jun-* 22, 1895.

Wrightsville Hardware Co., Wrightsville, Pa.

GENTLEMEN: Shipment at hand this day O K.
Please send at once, by same route, the following:
3 gross # 600 hammers,
2 " # 250 "
2 " # 254 "
1 gross # 1 hatchets,
30 and oblige,
Yours truly, R. D. UHTHOFF.

Dic. by M. C.

Importer, exporter, and jobber. *and jobber.*	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Jul-* 10, 1895.

Wrightsville Hardware Co., Wrightsville, Pa.

GENTLEMEN: Shipment at hand O K.
Please send at once, via same route—
3 gross # 600 hammers,
2 " # 250 "
2 " # 1 hatchets,
and oblige,
Yours truly,

R. D. UHTHOFF.
M.

Dic. by M. C.

Said witness then produced the following advertisement:

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

31 Correspondence solicited with tanners and curriers of harness leather and manufacturers of same desiring new fields for their output.

106 Hanover street, Baltimore, Md.

And said witness testified that he had cut the same from a periodical called "The Harness Gazette," but could not state the date of said publication, which he believed was March or April, 1895; that he believed said publication from which the advertisement was cut contained about one hundred pages of printed matter, and that he could not tell whether the defendant's name appeared elsewhere therein, nor remember any other portion of the contents. The prosecution then offered said advertisement in evidence, the defendant objecting; but the court overruled the objection and allowed the same to be read in evidence; to which several actions and rulings of the court the defendant then and there prayed leave to except.

Seventh Bill of Exceptions.

After the matters set forth in the aforegoing or sixth bill of exceptions, which is hereby incorporated in and made part of this the defendant's seventh bill of exceptions, the prosecution called J. A. Weston, who produced the following letters, said by witness to be received from mail in his letter-box, delivered by mail-carrier, and subsequently shown to be in Uhthoff's handwriting.

32

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Oct.* 15, '95.

Portland Ex. Ladder Co., Newark, N. Y.

GENTS: Please send catalogue, price-list, and discounts on your extension ladders and oblige,

Yours truly, R. D. UHTHOFF.

Dict. by U.

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Oct.* 18, '95.

Portland Extension Ladder Co., 28 Plane St., Newark, N. J.

GENTS: Your favor of the 16th inst., also price-list enclosed, at hand. Please send at once, via fast freight, the following as a sample order, and bill same with your best discounts:

1 painter's patent Flying Yankee extension ladder, 25 ft.
1 " " 20 "

and oblige,

Yours truly, R. D. UHTHOFF.
M.

Dict. by C.

33

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Oct.* 24, '95.

Portland Extension Ladder Co., 28 Plane St., Newark, N. J.

GENTS: Shipment of ladders as per invoice of Oct. 21st at hand O K. Please send, via Pa. R. R., 20 20-ft. painters' ladders, same as last, and bill, at same discount, and oblige,

Yours truly, R. D. UHTHOFF.

Dict. by U.

Importer, exporter, and jobber.	R. D. Uhthoff, importer and jobber.	Wholesale supplies for factories, dealers, etc.

Office removed to 106 Hanover St.

BALTIMORE, MD., U. S. A., *Nov.* 8, '95.

Portland Extension Ladder Co., 28 Plane St., Newark, N. J.

GENTS: Yours of Nov. 4th, envelope being dated Nov. 5th, was not received by us until Nov. 6th. The reason that we state this is owing to you saying in your letter that same will be ready for delivery by 7 a. m. Nov. 5th at our depot in this city. The lot were received yesterday O K. Please send at once, via same route,
34 20 20-ft. ladders, same as last, and bill, at same discount, and oblige,

Yours truly, R. D. UHTHOFF.

Dict by U.

To the admissibility of which said letters the defendant then and there objected, but the court overruled the objection and allowed said letters to be read in evidence; to which action and ruling of the court the defendant then and there prayed leave to except.

The said witness then testified that he had shipped goods from Newark, New Jersey, to the defendant's address in Baltimore, and came to Baltimore in the year 1895, in the month of November, to find the defendant and obtain payment for the goods, and was then, against the objection of the defendant, permitted further to testify that he then and there met a person to him unknown, who pointed out to witness a man whom the informer alleged to be the defendant Uhthoff, and that said person so pointed out was followed by witness, the occurrence being then described by witness as follows: "I made inquiries for information as to where he (Uhthoff) might be or where he (Uhthoff) could be found outside of 106 Hanover street, and I failed to get any information except that a man told me that he went by the window."

Mr. COLTON: We have objected continuously to his saying what other people have told him.

COURT: He can say that the man was pointed out to him.

Mr. COLTON: We reserve an exception.

35 WITNESS (continuing): Well, as I was looking out of the window a party pointed out another party going along the street and said, That is Mr. Uhthoff. That is all I know about it, and then I didn't know it was him, but I followed the man down Hanover street to the corner of Pratt, and east on Pratt street several doors, and then went into a store. I should judge it was Polish. The proprietor was a Pole or some foreigner. I followed him no further. I stopped there and went into a commission house, where they sold brushes, and waited about half an hour to see if he would come out. I concluded finally that he was the party that I wanted

to see; but he failed to come out, so I turned my attention to getting my goods to the depot and disposing of them."

To which several actions and rulings of the court this defendant then and there prayed leave to accept.

Eighth Bill of Exceptions.

After the matters set forth in the aforegoing or seventh bill of exceptions, which is hereby incorporated in and made part of this the defendant's eighth bill of exceptions, the prosecution called R. B. TIPPETT, who testified that he is an attorney-at-law, practising in Baltimore; that he had seen a great deal of defendant's handwriting; altogether two or three hundred letters written by him; that the letters heretofore introduced in evidence purporting to be
36 signed by one or the other of the defendants, Uhthoff and Cohen, were in the respective handwriting of the defendants.

Then the prosecution called J. H. DUER, who testified that the defendant Uhthoff, about April, 1895, offered to sell certain articles of merchandise below the regular market prices. The witness was then, against the objection of the defendant, allowed to give the following testimony:

"In the fall of 1894 the buyer of our upholstery goods department came to me one day and said that he had purchased from some stranger three pieces of artificial leather."

Mr. COLTON: Objected to, first, as to what other people told him; and, second, I think the inquiry is going too far back.

(Objection overruled and exception noted.)

The district attorney then asked: "At what prices were these goods purchased?" and witness continued:

"Mr. Maxwell has the bill. My recollection is that three pieces of artificial leather was about 40 cents per yard, which was about half the factory price."

To which action and ruling of the court the defendant then and there prayed leave to except.

Ninth Bill of Exceptions.

After the matters set forth in the foregoing or eighth bill of exceptions, which is hereby incorporated in and made part of this the defendant's ninth bill of exceptions, the prosecution called
37 G. W. S. MUSGRAVE, an attorney-at-law and collector in the city of Baltimore, who was permitted, against the defendant's objection, to testify that he had in his hands for collection "a vast number of claims" unpaid against the defendant, contracted in 1893 and '94 and '95, placed with the "Merchants' Protective Credit & Collection Bureau;" that he had, it seemed to him, one judgment against the defendant, and that "the court records" showed there were others prior to the transactions stated in the indictment; and the prosecution then called Alexander Hardcastle and other lawyers and collection agents, who were permitted to

testify, against the defendant's objection, that they had a large number of claims against the defendant for collection contracted during 1894 and 1895 and due to persons resident out of the city of Baltimore, none of which they had been able to collect.

To which several actions and rulings of the court the defendant then and there prayed leave to except.

9½ Bill of Exceptions.

After the matters set forth in the foregoing or ninth bill of exceptions, which is hereby incorporated in and made part of this the defendant's nine and one-half bill of exceptions, the prosecution called ALEXANDER HARDCASTLE, an attorney-at-law and collector, who was permitted, against the defendant's objection, to testify that he had in his hands for collection a great many claims against Richard D. Uhthoff, placed with "Shriver, Bartlett & Co.'s collection agency,"
and to testify that the "records in our (witness') office"
38 showed judgments against Rich'd D. Uhthoff, over the objection of the defendant.

The COURT: "What do you mean by that?"

Answer. "I mean the records of the office are in my possession, and I find from the records of the office that there have been judgments against him and they have not been paid. I don't want to be discourteous to Mr. Colton."

Mr. COLTON: "The court asks the question. It is perfectly proper to answer it."

To which several actions and rulings of the court the defendant then and there severally prayed leave to except.

Tenth Bill of Exceptions.

After the matters set forth in the foregoing or nine and one-half bill of exceptions, which is hereby incorporated in and made part of this the defendant's tenth bill of exceptions, and after the persons above named as witnesses had testified that they had been unable to collect their claims against Uhthoff, and that they were unpaid, the prosecution announced its case as closed, the foregoing being, in substance, the entire evidence, and the defendant then prayed the following instructions:

Defendant's Instruction No. 1.

"The court instructs the jury that no legally sufficient evidence
has been offered tending to prove that one or more of the
39 schemes to defraud alleged in the indictment was or were
devised by the defendant Max Cohen, and their verdict must be for said defendant.

Defendant's Instruction No. 3.

"That no legally sufficient evidence has been offered tending to prove that the scheme or schemes mentioned in the indictment was

or were by the defendant Max Cohen intended to be effected through a United States post-office, and their verdict must be for the said defendant."

Defendant's Instruction No. 5.

"That no legally sufficient evidence has been offered tending to prove that the letter or letters alleged in the indictment was or were either placed or caused to be placed in the post-office at Baltimore by the defendant Max Cohen for the purpose of executing said scheme or schemes mentioned in the indictment, and their verdict must be for the defendant."

The court refused each and all of said instructions; to which action and ruling of the court the defendant then and there prayed leave to except.

Eleventh Bill of Exceptions.

After the matters set forth in the aforegoing or tenth bill of exceptions, which is hereby incorporated in and made part of this the defendant's eleventh bill of exceptions, the defendant testified on his behalf, in substance, as follows:

"That he was employed as above stated; that he had written the aforegoing letters purporting to be written by him; that he had no knowledge of mailing or causing to be mailed any of the said letters; that at the time of writing said letters he acted in good faith, believing that the defendant Uhthoff would pay for the goods ordered, and that the goods, books, accounts, and papers of the said Uhthoff disappeared on or about December 18th, 1895, when the office in the warehouse of his said employer, Uhthoff, was broken in by a constable in execution of a writ of *fieri facias*, who took everything in execution on the premises; that he had seen his employer, Mr. Uhthoff, pay a great many bills.

RICHARD D. UHTHOFF then testified, in substance, that he had been engaged in the business of jobbing since February 1st, 1895, at 106 Hanover street, Baltimore; that he had written the aforegoing letters purporting to be written by him with the intention of mailing them; that he had at the time of the adoption of the letter-heading appearing in evidence been engaged in the jobbing business, importing occasionally and contemplating exports, but subsequently concluded to devote his entire attention to jobbing; that he had no knowledge or recollection of having mailed or caused to be mailed any of said letters; that all goods ordered by him were ordered in good faith, with the intention of paying for them; that the course and habit of his business was to pay for goods bought by him; that he had actually paid in the majority of cases of orders filled at his request, but could only recall the name of one person; that the books of account in which he kept a record of his transactions and accounts were two books known as his invoice and sales books and a small pocket-book;

that the sales book showed the sales made, the invoice book showed the goods received, and all other records of the business, including debts due by Uhthoff, were contained in a small note book habitually carried by Uhthoff in his pocket; but his warehouse had been broken into on the 18th of December, 1895, by a constable in execution of a writ of *fieri facias*, and, together with goods then seized, his books, accounts, and letters and vouchers disappeared, including said small book. On cross-examination Uhthoff admitted the purchase of a large number and variety of articles of merchandise, all of which had been sold, but in many instances not paid for. His office was 12 ft. x 10 ft.; owned no wagons and had no porters; goods at times on sidewalk. Cohen as well as Uhthoff indiscriminately received mail; goods bought on time; sales sometimes below, sometimes above, market price; had a small room for storage or warehouse purposes; admitted he advertised in "Harness Gazette."

Max Cohen further testified that he was employed by said Uhthoff at a weekly salary, other than which he had no interest in the business.

The defendant then produced a number of witnesses who testified that his character and reputation for honesty for a number of years past had been good.

42 *Twelfth Bill of Exceptions.*

After the matters set forth in the foregoing or eleventh bill of exceptions, which is hereby incorporated in and made part of this the defendant's twelfth bill of exceptions, the evidence being concluded and the foregoing being in substance the entire evidence, the defendant offered the following prayers for instructions to the jury:

Defendant's First Prayer. (Granted.)

Before the jury can find either of the defendants guilty they must be satisfied of his guilt as charged in some of the counts of the indictment against — beyond a reasonable doubt.

Defendant's Second Prayer. (Granted.)

In order to justify the jury in returning a verdict of guilty, the evidence must be of such a character as to satisfy their judgment to the exclusion of every reasonable doubt.

If, therefore, they can reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, they must acquit.

Defendant's Third Prayer. (Granted.)

A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves
43 the minds of the persons in the state that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

Defendant's Fourth Prayer. (Granted.)

The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty, to the benefit of which presumption the defendant is entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.

Defendant's Fifth Prayer. (Granted.)

The jury may take evidence of the defendant's good character for honesty into consideration in determining whether it creates a reasonable doubt of guilt.

Defendant's Sixth Prayer. (Granted.)

Even if the jury find the mailing by or at the instance of the accused of one or more of the letters described in the indictment, they cannot convict unless they find such act of mailing or causing to be mailed was accompanied by an intent on the part of the defendant to cheat or defraud the person or persons to whom the letter or letters was or were directed.

Defendant's Seventh Prayer. (Granted.)

44 Unless the jury affirmatively find that the defendant believed that goods alleged to have been obtained by him would not be paid for, they cannot convict of an intent to cheat or defraud by reason of the mere fact of non-payment.

Defendant's Eighth Prayer. (Granted.)

The jury must acquit the accused unless they affirmatively find from evidence satisfying them beyond a reasonable doubt—

First. That one or more of the schemes to defraud alleged in the indictment was or were devised by the accused.

Second. That such scheme or schemes was or were by him intended to be effected through a post-office of the United States.

Third. That a letter or letters alleged in the indictment was or were either placed or caused to be placed in a post-office at Baltimore by the accused for the purpose of executing such scheme or schemes.

And a failure to find any one of these elements established beyond a reasonable doubt entitles the accused to an acquit-al.

Defendant's Instruction No. 14. (Granted.)

That if the jury find that at the time the defendant purchased the goods described in the indictment he had not sufficient money to pay therefor, still if they find that he had or may have
45 had a reasonable expectation in due course of his business to pay therefor at the time of the maturity thereof, the fact of

non-payment thereof at maturity is not to be considered by the jury as conclusive evidence of intent to cheat or defraud the seller at the time he gave the order of purchase to him.

Defendant's Instruction No. 12. (Granted.)

The fact that the defendant had not paid for some of the goods bought by him and mentioned in evidence is not to be considered by the jury as conclusive that said goods were purchased by the defendant with intent to defraud.

Defendant's Instruction No. 9. (Refused.)

There is no evidence legally tending to prove that any of the letters averred in the indictment was placed or caused to be placed by the defendant in the post-office at Baltimore city, and the verdict must therefore be not guilty.

Defendant's Instruction No. 10. (Refused.)

The mere fact that the defendant did not pay for goods alleged in the indictment to have been obtained by him is immaterial. The jury must, in order to convict, be satisfied by the evidence that the defendant's act of ordering goods was coupled with an intent or design not to pay for the same.

46 *Defendant's Instruction No.* 11. (Refused.)

There is no evidence legally tending to prove that the defendant falsely pretended or assumed to be an importer, exporter, jobber, or dealer, as averred in the indictment, and the verdict must therefore be not guilty.

Defendant's Instruction No. 13. (Refused.)

There is no evidence legally tending to prove that a letter or letters alleged in the indictment *or* were either placed or caused to be placed in the post-office of the United States at Baltimore by the accused for the purpose of executing the scheme or schemes mentioned in the indictment, and the verdict of the jury must be in favor of the accused.

Defendant's Instruction No. 15. (Refused.)

There is no evidence legally tending to prove that one or more of the schemes to defraud alleged in the indictment was or were devised by the accused, and the verdict of the jury must be for the accused.

Defendant's Instruction No. 16. (Refused.)

There is no evidence legally tending to prove that one or more of the schemes to defraud mentioned in the indictment was or were

intended by the accused to be effected through a post-office
47 of the United States, and the verdict of the jury must be in favor of the accused.

The court granted the defendant's first, second, third, fourth, fifth, sixth, seventh, eighth, twelfth, and fourteenth prayers and refused the defendant's ninth, tenth, eleventh, thirteenth, fifteenth, and sixteenth prayers.

To which action and ruling of the court in the rejection of said prayers so rejected the defendant then and there prayed leave to except.

And the court gave the following charge:

COURT: In addition to the granting of the prayers which I have passed upon I will add some instructions:

I take up, first, the indictment against Uhthoff, in whose name this business was carried on. As you know, gentlemen of the jury, the post-office in this country is an absolute monopoly, controlled by the United States Government. The General Government undertakes to provide mail facilities for the people of the United States, by which, at the small expense of a postage stamp, communication can be opened up by the writer with the most distant parts of the country. It is a great privilege, both for good and evil, and the Government of the United States, to protect its citizens, has enacted the statute under which this indictment is framed, the purpose of which is to prevent and to punish any attempt to use these great facilities of the mails to perpetrate fraud, and so it enacts that
any one who devises a scheme to defraud by opening corre-
48 spondence with any other person and in executing that scheme puts a letter in the post-office he shall be guilty of an offence and shall be liable to a punishment by a fine of not more than $500 or an imprisonment of not more than 18 months, or both, the fine and imprisonment being in the discretion of the court.

Now, as to the words "scheme to defraud." The word "scheme" is used in the ordinary sense in which we use it in common language and means any combination of acts adjusted or designed to effect some purpose—it means a plan by which something is to be accomplished by successive acts, few or numerous.

Now, the indictment requires that you shall first find that Uhthoff had in his mind a scheme to defraud, and to effect that scheme he put or caused to be put the letters, or one or more of them, that are mentioned in the indictment into the post-office. The charge is that the scheme he devised was to order goods of persons throughout the country, intending at the time he ordered them not to pay for them, or, at any rate, that he could have had no reasonable expectation of being able to pay for them, which would result in his having an intention not to pay for them.

It has been urged as a defence, and the defendant has testified it, that at the time he ordered these goods he did intend to pay for them. That is his statement of his intention. You are entitled to weigh that statement and to judge of its truthfulness by all the surrounding facts.

49 If you find from his course of dealings through a number of months that he continually ordered these goods, that they were of such very great variety that he must have expected merely to attempt to sell them, and that he must have expected to run all the risks of selling, having no established customers or trade; and if you find that, not being able to pay for these that he first ordered, *that* he continued after that to order again and again and again, without paying; if you find that he selected people who were at a distance from Baltimore; if you find that he ordered in such quantities as made it likely that his first purchase would be fulfilled without much inquiry as to his solvency, not being large purchases, but small, you are entitled to consider all these circumstances and any others which may occur to you from the proof as you may believe it.

I recognize among you a number of business men, men who know a great deal about business affairs and how they are conducted—men able to judge when they are conducted honestly and when dishonestly. It is for you to say whether to your minds facts have been proven from which you may infer with certainty, with a reasonable certainty, that the defendant Uhthoff had no intention of paying for these goods, no reasonable expectation of being able to pay for them, when he ordered them. (In that connection, so far as you find that the parties had proved themselves here in Baltimore a good reputation, you are entitled in the case of doubt to consider that good reputation as turning the scales in the defend-
50 ant's favor; but where the facts are proven which lead you to a conclusion the fact of a good reputation is no answer to absolute proof; it is only when your mind wavers as to what construction you are to put upon an act you are entitled to consider the good reputation of a man as turning the scale in his favor. That good reputation, of course, is added to the general presumption which attends a man when he is accused of crime, until the proof is sufficient to satisfy you of the facts which constitute his guilt; but when facts are proven to your satisfaction, facts which under the law result in guilt, then you must find him guilty.)

I have granted a number of prayers in behalf of the defendant. These prayers state propositions of law which should guide you in your consideration of the testimony, and what I have said to you in addition you will also take into consideration when you consider the case.

With regard to Cohen the facts are somewhat different. He was with Uhthoff in some capacity, and he has stated to you what his relationship was. It is for you to say from all the circumstances surrounding that business how far you give weight to his statement and to the other evidence which goes to support his statement. His statement is entitled to the same weight that the statement of any other witness is, but no more. You are to judge of its truthfulness by all the surrounding testimony, and to give it the weight that you think it is entitled to receive. The indictment charges that Cohen had devised a scheme to
51 defraud. Now, if he was aware that Uhthoff's business was

a fraudulent one, that he was using the United States mails in sending these letters in pursuance of a scheme to defraud, and he got into that scheme and sent the letters charged in the indictment against him, then he is as guilty as if he had devised it, if he was a participant in it. Under these circumstances he may be said, in the language of the indictment, "to have devised the scheme"—that is, he came into the scheme which had been devised, whether he was in it at the beginning or not, and if, with full knowledge, and with the intention and purpose to defraud, he wrote the letters which are charged in the indictment against him, or sent them or caused them to be sent in furtherance of that scheme, then he is as guilty as if they had been sent in his own name, provided always that he wrote the letters and caused them to be sent by mail (or wrote them with the intention that they should be sent by mail), and you find that they were so sent and that he was a participant in the scheme to defraud. If he was merely a clerk and pursued the direction of his employer without knowledge of a fraudulent scheme which it is alleged that Uhthoff had devised, then, of course, he will be innocent.

To that portion of said charge wherein the court stated, "In that connection, so far as you find that the parties have proved themselves to have here in Baltimore a good reputation, you are entitled in the case of doubt to consider that good reputation as turning the scales in the defendant's favor, but where the facts are proven
52 which lead you to a conclusion, the fact of a good reputation is no answer to absolute proof. It is only when your mind wavers as to what construction you are to put upon an act you are entitled to consider the good reputation of a man as turning the scales in his favor. That good reputation, of course, is added to the general presumption of innocence which attends a man when he is accused of crime until the proof is sufficient to satisfy you of the facts which constitute his guilt, but where facts are proven to your satisfaction, facts which under the law result in guilt, then you must find him guilty."

And to that portion of said charge wherein the court stated "or wrote them with the intention that they should be sent by mail" the defendant then and there prayed leave to except, and that the court sign and seal this his bill of exceptions; which is accordingly done this 7th day of February, 1896.

THOS. J. MORRIS, *Judge.* [SEAL.]

53 *Petition for Writ of Error and Order of Court Allowing Same and Admitting Petitioner to Bail.*

Filed March 12, 1896.

In the Supreme Court of the United States.

MAX COHEN, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

To the honorable the justices of said court:

The petition of Max Cohen respectfully shows:

First. That at the December term of the district court of the United States for the district of Maryland your petitioner, being separately indicted, was jointly tried with one Richard D. Uhthoff upon indictments severally charging them with an infamous crime, to wit, the crime of placing letters in the post-office at Baltimore, in execution of a scheme to defraud, to be effected by correspondence with another person by means of the Post-office establishment, the trials having been consolidated by order of said court over the objection of your petitioner.

Second. That your petitioner was convicted (as well as said Uhthoff) of said charge, and your petitioner (as well as said Uhthoff) was sentenced to imprisonment in the Maryland penitentiary
54 for eighteen months, and to the payment of a fine of five hundred dollars, on the seventh day of February, 1896, and your petitioner (as well as said Uhthoff) was immediately imprisoned in said penitentiary in execution of said sentence.

Third. That in said judgment and record of proceedings certain manifest errors were committed to the great injury of your petitioner (as well as said Uhthoff), all of which will more fully appear from the assignment of errors herewith filed.

Your petitioner (as well — said *said* Richard D. Uhthoff) therefore prays that a writ of error may issue, directed to said district court, for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers of said cause, duly authenticated, may be transmitted to this honorable court.

WM. COLTON,
Attorney for Petitioner.

The prayer of the aforegoing petition is granted and a writ of error ordered to be issued as prayed.

It is further ordered that the above-named petitioner, Max Cohen, be admitted to bail upon entering into a recognizance in the usual form, in the sum of three thousand five hundred dollars, with a surety or sureties to be approved by the judge of the district court of the United States for the district of Maryland.

MELVILLE W. FULLER,
Chief Justice of the United States.

Washington, D. C., March 12, 1896.

55 *Assignment of Errors.*

Filed March 12, 1896.

MAX COHEN, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error.
} In the Supreme Court of the United States.

The plaintiff in error makes the following assignment of errors, which he says are manifest in the judgment and record of proceedings in the petition for writ of error herewith filed mentioned.

I.

That the court below erred in overruling his objection interposed to the consolidation of his case with that of one Richard D. Uhthoff, he being separately indicted, being charged with an infamous crime, to wit, the crime of placing letters in the post-office at Baltimore in execution of a scheme to defraud, to be effected by correspondence with another person by means of the Post-office establishment, the said Uhthoff being charged in a separate indictment for the commission of the same offence. The offence charged in each indictment being against different persons, by the overruling of the objection of the said Cohen and the consolidation of said causes and trying the same jointly upon indictments severally
56 charging the said Cohen and the said Uhthoff with said crime your petitioner was greatly prejudiced and injured, and because the same was contrary to law.

II.

That the court below erred in overruling his demurrer to the indictment in the following points:

1. Said indictment was defective in this, because the person to whom the letter therein alleged to have been sent by the use of the United States mail in violation of section 5480, Revised Statutes, was a material averment, both to inform the defendant as well as to enable him to make answer and to charge him with the *corpus delicti*, no such averment appearing in said indictment, the only averment being as to such person in the following words, to wit: "The Davis & Stevens Manf. Co., Seneca Falls, N. Y.," which statement was an insufficient averment of a person or persons necessary to be named, and the said demurrer should have been sustained.

2. Said indictment was defective in this, because the person to whom the letter therein alleged to have been sent by the use of the United States mail in violation of section 5480, Revised Statutes, was a material averment, both to inform the defendant as well as to enable him to make answer and to charge him with the *corpus delicti*, no such averment appearing in said indictment, the only averment being as to such person in the following words, to wit:

"Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louis-
57 ville, Ky.," which statement was an insufficient averment of a person or persons necessary to be named, and the said demurrer should have been sustained.

3. Said indictment was defective in this, because the person to whom the letter therein alleged to have been sent by the use of the United States mail in violation of section 5480, Revised Statutes, was a material averment, both to inform the defendant as well as to enable him to make answer and to charge him with the *corpus delicti*, no such averment appearing in said indictment, the only averment being as to such person in the following words, to wit: "Wrightsville Hardware Co., Wrightsville, Pa.," which statement was an insufficient averment of a person or persons necessary to be named, and the said demurrer should have been sustained.

4. Said indictment should have been quashed because there is no proper averment of any person intended to be defrauded.

II.

That the court below erred in the admission of the following evidence on behalf of the Government:

1. In admitting the five letters produced by the witness, G. W. Shaw, to be read in evidence, because the mailing of said letters was not proven and their contents were irrelevant.

2. In admitting the five letters produced by the witness, A. Day, to be read in evidence, because the mailing of said letters
58 was not proven and their contents were irrelevant, and because said witness stated that he recollected no postmark on said letters.

3. In admitting the statement of the witness, Wm. F. Focke, that a great many people called at his office to inquire for plaintiff in error, because said testimony was irrelevant and hearsay.

4. In permitting the statement of the witness, F. N. Stevens, that persons to whom he offered pumps had made statements to him (witness) that they could buy cheaper, because said testimony was irrelevant and hearsay.

5. In admitting the five letters produced by the witness, F. N. Stevens, to be read in evidence, because the mailing of said letters was not proven and because their contents were irrelevant.

6. In admitting the four letters produced by the witness, H. B. Bernstock, to be read in evidence, because the mailing of said letters was not proven and because their contents were irrelevant.

7. In admitting said witness Bernstock to be sworn and examined in chief, because his name was not in the list of witnesses.

8. In admitting the advertisement produced by said Bernstock to be read in evidence, it appearing affirmatively that the same was cut from a magazine or publication which was not produced or offered to be accounted for and not in the possession or custody of the plaintiff in error, and said witness Bernstock could not state that such advertisement was not accompanied by matters explanatory thereof.

59 9. In admitting the four letters produced by the witness, J. A. Weston, to be read in evidence, because the mailing of said letters was not proven and their contents were irrelevant.

10. In permitting said witness Weston to testify as to the actions of a person whom, as he said, he took to be the plaintiff in error, there being no proof that such was the fact, and in permitting said witness Weston to state that he, Weston, had been told that the said person was the plaintiff in error, because said testimony was mere opinion and hearsay.

11. In permitting the witness, J. H. Duer, to state that one of his clerks had stated to witness, the said Duer, that his said clerk had purchased from a stranger three pieces of artificial leather in 1894, because said testimony was irrelevant in general, remote, and hearsay.

12. In permitting the witness, G. W. S. Musgrave, to testify that a number of persons had placed in his hands for collection claims against the said plaintiff in error, said evidence being hearsay and secondary and immaterial and prejudicial to the plaintiff in error.

13. In permitting said witness Musgrave to state that there was a "vast" number of claims outstanding against the plaintiff in error which could not be collected, because said testimony was irrelevant, opinion evidence, secondary, hearsay, and prejudicial to the plaintiff in error.

14. In permitting said witness Musgrave to state that judg-
60 ments were outstanding against the plaintiff in error, he having obtained one and heard of others, because said evidence was irrelevant, secondary, hearsay, and prejudicial to the plaintiff in error.

15. In permitting the witness, Alexander Hardcastle, to give similar evidence.

III.

That the court below erred in its refusal to give the following instructions asked by the counsel for the plaintiff in error at the close of the Government's testimony:

1. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 1.

"The court instructs the jury that no legally sufficient evidence has been offered tending to prove that one or more of the schemes to defraud alleged in the indictment was or were devised by the defendant, Max Cohen, and their verdict must be for said defendant."

because there was in fact no proof of the matters referred to in said prayer.

2. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 3.

"That no legally sufficient evidence has been offered tending to prove that the scheme or schemes mentioned in the indictment was or were by the defendant, Max Cohen, intended to be effected through a United States post-office, and their verdict must be for the said defendant."

61 because there was in fact no proof of the matters referred to in said prayer.

3. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 5.

"That no legally sufficient evidence has been offered tending to prove that a letter or letters alleged in the indictment was or were either placed or caused to be placed in the post-office at Baltimore by the defendant, Max Cohen, for the purpose of executing such scheme or schemes mentioned in the indictment, and their verdict must be for the defendant."

because there was in fact no proof of the matters referred to in said prayer.

IV.

That the court below erred in its refusal to give the following instruction requested by the plaintiff in error at the close of the entire testimony:

Defendant's Instruction No. 9.

"There is no evidence legally tending to prove that any of the letters averred in the indictment was placed or caused to be placed by the defendant in the post-office at Baltimore, and the verdict must therefore be not guilty."

because there was in fact no proof of the matters referred to in said prayer.

62 2. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 10.

"The mere fact that the defendant did not pay for goods alleged in the indictment to have been obtained by him is immaterial. The jury must, in order to convict, be satisfied by the evidence that the defendant's act of ordering goods was coupled with an intent or design not pay for the same."

because said instruction was supported as to the fact therein alleged by the evidence in the case and the law applicable thereto.

3. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 11.

"There is no evidence legally tending to prove that the defendant falsely pretended or assumed to be an importer, exporter, jobber, or dealer, as averred in the indictment, and the verdict must therefore be not guilty."

because there was in fact no proof of the matters referred to in said prayer.

4. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 13.

"There is no evidence legally tending to prove that a letter or letters alleged in the indictment was or were either placed or
63 caused to be placed in the post-office of the United States at Baltimore by the accused for the purpose of executing the scheme or schemes mentioned in the indictment, and the verdict of the jury must be in favor of the accused."

because there was in fact no proof of the matters referred to in said prayer.

5. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 15.

"There is no evidence legally tending to prove that one or more of the schemes to defraud alleged in the indictment was or were devised by the accused, and the verdict of the jury must be for the accused."

because there was in fact no proof of the matters referred to in said prayer.

6. The instruction prayed by the plaintiff in error, which was contained in the following prayer:

Defendant's Instruction No. 16.

"There is no evidence legally tending to prove that one or more of the schemes to defraud mentioned in the indictment was or were intended by the accused to be effected through a post-office of the United States, and the verdict of the jury must be in favor of the accused."

because there was in fact no proof of the matters referred *in* in said prayer.

V.

64 Because the court below erred in using the following language in its charge to the jury:

"Or wrote them with the intention that they should be sent by

mail," because the intent alone, without an act done in execution and furtherance thereof, is not a crime.

Because the court below erred in using the following language, also, in its charge to the jury:

"In that connection, so far as you find that the parties have proved themselves here in Baltimore a good reputation, you are entitled in the case of doubt to consider that good reputation as turning the scales in the defendant's favor; but where the facts are proven which lead you to a conclusion, the fact of a good reputation is no answer to the absolute proof. It is only when your mind wavers as to what construction you are to put upon an act you are entitled to consider a good reputation of a man as turning the scale in his favor. That good reputation, of course, is added to the general presumption of innocence which attends a man when he is accused of crime until the proof is sufficient to satisfy you of the facts which constitute his guilt; but when facts are proven to your satisfaction, facts which under the law result in guilt, then you must find him guilty."

because said language erroneously assumes that proof of good character or reputation is not in itself sufficient to create a reasonable doubt of guilt in the minds of the jury, but is only to be considered in cases where the evidence is otherwise doubtful, thus discounting the true legal effect of evidence of good reputation, and be-
65 cause said instruction was inconsistent with a correct theory of law, as at first announced by the said court in granting the following instruction, to wit:

Defendant's Fifth Instruction.

"The jury may take evidence of the defendant's good character for honesty into consideration in determining whether it creates a reasonable doubt of guilt."

and thus in effect retracting its granting of said prayer.

VII.

Because the court should have entered judgment for the plaintiff in error instead of the defendant in error.

VIII.

Because of other errors in said judgment and record of proceedings to be hereafter assigned in the brief.

Wherefore this plaintiff prays that said judgment and proceedings be reversed.

WM. COLTON,
Attorney for Plaintiff in Error.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the district of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, and Max Cohen, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] Writ of error. Max Cohen. (C.)

67 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Maryland, wherein Max Cohen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-six

MELVILLE W. FULLER,
Chief Justice of the United States.

Service of copy accepted this 12th day of March, 1896.

W. S. MARBURY, *U. S. Att'y.*

[Endorsed:] Citation. Max Cohen. (D.)

68 MEMORANDUM.—On March 14, 1896, Max Cohen, the defendant, was recognized in the sum of $3,500.00, with John Cohen as surety in same amount, for his appearance from day to day to abide the order of the Supreme Court and of the district court.

JAS. W. CHEW, *Clerk.*

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

JAS. W. CHEW, *Clerk.*

69 UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I, James W. Chew, clerk of the district court of the United States in and for the district of Maryland, do hereby certify that the aforegoing is a true transcript of the record and proceedings, together with all things thereunto relating, of the district court of the United States in and for the district of Maryland in the cause aforesaid.

Seal United States District Court, Maryland.

In testimony whereof I hereunto set my hand and affix the seal of the said district court this ninth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

JAS. W. CHEW,
Clerk of said District Court.

[Endorsed:] Max Cohen, plaintiff in error, *vs.* The United States. In error to the district court of the U. S. for the district of Maryland.

Endorsed on cover: Case No. 16,250. Maryland D. C. U. S. Term No., 485. Max Cohen, plaintiff in error, *vs.* The United States. Filed April 11, 1896.

164-702

SUPREME COURT, U. S.
AUG 28 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 485.

MAX COHEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR THE PLAINTIFF IN ERROR.

WILLIAM COLTON,
Attorney for Plaintiff in Error.

(16,250.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 485.

MAX COHEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

STATEMENT OF CASE.

The case arises upon a writ of error to the district court for Maryland district in a proceeding by indictment against the plaintiff in error under section 5480 Revised Statutes.

The indictment charges that the plaintiff in error on the 4th day of March, 1895, at Baltimore city, in said district, had unlawfully and corruptly devised a scheme and artifice to defraud divers persons, which scheme and artifice was of the following character and description, to wit: He, the said Max Cohen, then and there intended to obtain from divers manufacturers and merchants divers articles of merchandise to be sent by said manufacturers and merchants to a certain Richard D. Uthoff, whom the said Cohen falsely represented to be an importer, exporter, and jobber and dealer in wholesale supplies for factories, dealers, " etc.," the said articles of merchandise to be obtained from the manufacturers and merchants aforesaid by the false pretense made to them by the said Max Cohen that they should be paid for

the same by the said Richard D. Uthoff, he, the said Max Cohen, then and there well knowing and believing that the said manufacturers and merchants would not in truth and fact be paid by the said Uthoff, and then and there contriving and intending fraudulently to convert the said articles of merchandise to his own use and profit; that the aforesaid scheme was to be effected by opening correspondence and communication with the manufacturers and merchants aforesaid by means of the Post Office Establishment of the United States and by inciting the manufacturers and merchants aforesaid to open communication with him, the said Max Cohen; that the said Max Cohen, devising and intending to defraud in the manner aforesaid the "Davis and Stevens Manufacturing Company," in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "The Davis & Stevens Manuf. Co., Seneca Falls, New York," to be sent and delivered by the said Post Office Establishment (*the letter being averred according to the tenor*); and the said Max Cohen, devising and intending to defraud in the manner aforesaid the "Turner, Day & Woolworth Manufacturing Company," in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "Turner, Day & Woolworth Manufacturing Company, 7th & Oak St., Louisville, Ky.," to be sent and delivered by the said Post Office Establishment (*the letter being averred according to the tenor*); and the said Max Cohen, devising and intending to defraud in the manner aforesaid the "Wrightsville Hardware Company," in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States,

to wit, in the post-office at Baltimore city aforesaid, a certain letter addressed to "Wrightsville Hardware Co., Wrightsville, Pa.," to be sent and delivered by the said Post Office Establishment (*the letter being averred according to the tenor*). (Record, pp. 2–4.)

The plaintiff in error filed a general demurrer to this indictment, which was overruled, and he then pleaded over. The first question raised arises upon the overruling of this demurrer.

When the case was called for trial there was also pending against Richard D. Uthoff a separate case upon an indictment under the same section (5480) of the Revised Statutes, charging him in substantially similar phraseology with having placed in the post-office at Baltimore letters addressed to "Messrs. Ratcliffe & Shaw, Glen Rock, Pa., York Co.;" "Turner, Day and Woolworth Mfg. Co., Louisville, Ky.," and "The Davis & Stevens Mfg. Co., Seneca Falls, N. Y.," in and for the purpose of executing an artifice and scheme to defraud. (Record, pp. 5–7.)

The court below, against the objection and protest of the plaintiff in error, ordered and required the two indictments to be tried together (Record, p. 5). The objection to this action is presented in the first bill of exceptions. (Record, pp. 1–8.)

The next questions arising in the case are presented in several bills of exception, numbers two to nine and a half, all in relation to the admissibility of testimony produced by the Government. (Record, pp. 8–21.)

After the close of the testimony for the prosecution the defense offered three requests or prayers for instructions to the effect that the Government has failed to sustain the allegations of the indictments, and that the verdict must therefore be not guilty. These instructions were refused and the plaintiff in error took exceptions.

The questions thus raised are presented in the tenth bill of exceptions. (Record, pp. 21, 22.)

Testimony was then introduced on behalf of the defense. (Record, pp. 22, 23.)

At the close of this testimony a series of prayers or requests for instruction were presented on behalf of the defense. Six of these were rejected and exception was taken. The court then delivered a charge to the jury, part of which was excepted to. The questions thus raised are presented in the twelfth bill of exceptions. (Record, pp. 23–28.)

Specification of Errors.

1. Error in overruling demurrer to indictment, this pleading being defective and insufficient in the following particulars:

(*a*) The names of persons to whom the letters, the mailing of which is the gravamen of the charge, are alleged to have been sent are averred in words, figures, and letters as follows:

"The Davis & Stevens Manf. Co., Seneca Falls, N. Y."

"Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louisville, Ky."

"Wrightsville Hardware Co., Wrightsville, Pa."

(*b*) The allegations of names of persons intended to be defrauded are in the same form.

(*c*) There is absolutely no allegation of the time of the principal fact, the commission of the offense itself, to wit, the placing of the letters in the post-office. In the first part of the indictment mere matters of *inducement* are set forth, with averments of time and place, but the matter which constitutes the *gist of the offense* is averred as follows:

"That the said Max Cohen, devising and intending to defraud in the manner aforesaid (*naming parties as above*),

in and for executing said scheme and artifice, unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter."

2. Error in requiring this case and one against Richard D. Uthoff, upon a separate indictment, charging a separate offense, to be consolidated and tried together as one case.

3. Error in the admission of the following evidence:

(*a*) William F. Focke, whose place of business about the time of the alleged fraudulent transactions of the plaintiff in error was in the same building, was allowed to give the following testimony:

Question. "How much was the defendant Uthoff in his office?"

Answer. "I cannot say how often Mr. Uthoff or Mr. Cohen has been in his office, but I can say there has been a great many people called at my office to inquire for him." (Record, pp. 12, 13.)

(*b*) Frank N. Stevens testified that he is the treasurer of the Davis and Stevens Manufacturing Company, a New York corporation doing business at Seneca Falls, New York; that during the year 1895 said corporation received orders from Richard D. Uthoff for the shipment to him at Baltimore of a number of pumps of its manufacture. The witness was then allowed to give the following testimony:

Question. "Please state what your experience was in attempting to sell your pumps."

Answer. "My experience was this: I entered two different stores here in the city (Baltimore) to try to sell our goods, and I was met with the statement that they could purchase the goods cheaper, and they exhibited to me the goods which we manufacture and of which we had never sold any to any

other parties in Baltimore than Mr. Uthoff. I was met with that statement that they could buy them cheaper than we could sell them to them, and the price at which they bought them I knew to be below what they could be manufactured for. In another store I was shown a little hand pump and the person stated that they were left in his possession, and that he had to pay cash for them, and he bought them for 5 cents apiece, while we couldn't manufacture them for less than 12 cents apiece."

The witness further stated that the hand pumps were sold to different persons in Baltimore. (Record, pp. 14, 15.)

(*c*) H. B. Bernstock produced in evidence a printed slip of the following tenor:

"R. D. Uthoff, importer and jobber.

"Importer, exporter, and jobber. Wholesale supplies for factories, dealers, etc.

"Correspondence solicited with tanners and curriers of harness leather and manufacturers of same desiring new fields for their output.

"106 HANOVER STREET, BALTIMORE, MD."

Witness stated that he had cut the same from a periodical called the "Harness Gazette," but could not state the date of publication, which he believed to be March or April, 1895; that he believed the entire publication from which the slip was cut contained about 100 pages, and could not tell whether the name of the defendant Uthoff appeared elsewhere therein, nor could he remember any other portion of the contents; and upon this statement the slip was allowed in evidence. (Record, p. 17.)

(*d*) J. A. Weston was permitted to give the following testimony: Having shipped goods from Newark, N. J., to the address in Baltimore of R. D. Uthoff, he came to Baltimore in November, 1895, to find Uthoff and demand payment.

There "a party" pointed out to witness "another party going along the street," saying, "That is Mr. Uthoff." Witness was then allowed to state that he followed him and the man went into a store which witness "judged" to be "Polish;" that witness waited for about half an hour for him to come out, and finally "concluded" that he was Uthoff, and as the man "failed to come out," witness left. (Record, pp. 19, 20.)

(*e*) J. H. Duer was allowed to testify as follows, after having first stated that about April, 1895, Uthoff offered to sell certain articles of merchandise below the regular prices: "In the fall of 1894 the buyer of our upholstery-goods department came to me one day and said that he had purchased from some stranger three pieces of artificial leather."

(Mr. Colton objected. Objection overruled, and district attorney asked, "At what prices were these goods purchased?")

"Mr. Maxwell has the bill. My recollection is that three pieces of artificial leather was about forty cents per yard, which was about half the factory price." (Record, p. 20.)

(*f*) G. W. S. Musgrave, attorney-at-law and collector, was allowed to testify that he had in his hands for collection "a vast number of claims" unpaid against the defendant, contracted in 1893, 1894, and 1895, placed with a collection agency; that it had, it seemed to him, one judgment against the defendant, and that the "court records" showed that there were others. Other witnesses were allowed to give similar testimony, and Alexander Hardcastle, an attorney and collector, was permitted to testify that the records "*of his* (*witness'*) *office* showed THAT THERE WERE A GREAT many claims against Uthoff. (Record, pp. 20, 21.)

4. Error in refusing to give the following instructions requested by the plaintiff in error:

(*a*) Instructions requested at close of case for Government:

That no legally sufficient evidence has been offered tending to prove that one or more of the schemes to defraud alleged in the indictment was or were devised by the defendant, Max Cohen, and their verdict must be for said defendant. ("Defendant's instruction No. 1," Record, p. 21.)

That no legally sufficient evidence has been offered tending to prove that the scheme or schemes mentioned in the indictment was or were by the defendant, Max Cohen, intended to be effected through a United States post-office, and their verdict must be for said defendant. ("Defendant's instruction No. 3," Record, pp. 21, 22.)

That no legally sufficient evidence has been offered tending to prove that the letter or letters alleged in the indictment was or were either placed or caused to be placed in the post-office at Baltimore by the defendant, Max Cohen, for the purpose of executing the said scheme or schemes mentioned in the indictment. ("Defendant's instruction No. 5," Record, p. 22.)

(*b*) Instructions requested at the close of the entire case:

The mere fact that the defendant did not pay for goods alleged in the indictment to have been obtained by him is immaterial. The jury must, in order to convict, be satisfied by the evidence that the defendant's act of ordering goods was coupled with an intent or design not to pay for the same. ("Defendant's instruction No. 10," Record, p. 25.)

There is no evidence legally tending to prove that any of the letters averred in the indictment was placed or caused to be placed by the defendant in the post-office of Baltimore city, and the verdict must, therefore, be not guilty. ("Defendant's instruction No. 9," Record, p. 25.)

There is no evidence legally tending to prove that a letter or letters alleged in the indictment was or were either placed or caused to be placed in the post-office of the United

States at Baltimore by the accused for the purpose of executing the scheme or schemes mentioned in the indictment, and the verdict of the jury must be in favor of the accused. ("Defendant's instruction No. 13," Record, p. 25.)

There is no evidence legally tending to prove that one or more of the schemes to defraud alleged in the indictment was or were devised by the accused, and the verdict of the jury must be for the accused. ("Defendant's instruction No. 15," Record, p. 25.)

There is no evidence legally tending to prove that one or more of the schemes to defraud mentioned in the indictment was or were intended by the accused to be effected through a post-office of the United States, and the verdict of the jury must be in favor of the accused. ("Defendant's instruction No. 16," Record, pp. 25, 26.)

5. Error in the charge of the court in the following particulars:

(*a*) In the following part of the charge:

"Now, if he (Cohen) was aware that Uthoff's business was a fraudulent one—that he was using the United States mails in sending these letters in pursuance of a scheme to defraud and he got into that scheme and sent the letters charged in the indictment against him—then he is as guilty as if he had devised—as if he was a participant in it. Under these circumstances he may be said, in the language of the indictment, 'to have devised the scheme'—that is, he came into the scheme which had been devised—whether he was in at the beginning or not, and if, with full knowledge and with the intention and purpose to defraud, he wrote the letters which are charged in the indictment against him, or sent them or caused them to be sent in furtherance of that scheme, then he is as guilty as if they had been sent in his own name, provided always that he wrote the letters and caused them to be sent by mail *or wrote them with the intention that they should be sent by mail* and you find that they were so sent, and that he was a participant in the scheme to defraud." (Record, pp. 27, 28.)

(*b*) In the following part of the charge:

"In that connection, so far as you find that the parties had proved themselves here in Baltimore a good reputation, you are entitled *in the case of doubt* to consider that good REPUTATION as turning the scales in the defendant's favor, but *where the facts are proven* which lead you to a conclusion *the fact of a good reputation is no answer to absolute proof; it is only when your mind wavers as to what construction you are to put upon an act that you are entitled to consider the good reputation of a man as turning the scale in his favor.* That good reputation, of course, is added to the general presumption which attends a man when he is accused of crime until the proof is sufficient to satisfy you of the facts which constitute his guilt; but *when facts are proven to your satisfaction—facts which under the law result in guilt*—then you must find him guilty." (Record, p. 27.)

BRIEF OF THE ARGUMENT.

1. As to the pleadings.

A general demurrer was filed to the indictment (Record, p. 4), and the action of the court below in overruling the demurrer is made the subject of an assignment of errors specifying grounds of objection to the indictment. (Record, pp. 30, 31.)

(*a*) The gravamen of the offense under section 5480 Revised Statutes charged against the plaintiff in error is, of course, the placing (or causing to be placed) in the Baltimore post-office of the letter set forth in the indictment. *That is the act of which he stands accused.* It is essential to the *criminality* of this act that the accused should have devised a scheme to defraud, and that the mailing should be

done in execution of (with intent to accomplish) this scheme or purpose. Liability to punishment arises, not from the contriving of the scheme or formation of the intent, but from its execution. The moment of time when the letter was mailed fixes the liability to punishment, and the place of mailing determines the proper tribunal which may impose that punishment. The time and the place of devising the scheme to defraud, which is a mere "circumstance accompanying the act," are immaterial. In this case the pleader seems to have proceeded upon the opposite theory. The matters of inducement are laid with time and place, but the *material part* of the indictment, the act which constitutes the offense alleged, is contained in the averment "did place and caused to be placed in a post-office of the United States, to wit, in the post-office at Baltimore city aforesaid, a certain letter."

Record, pp. 3, 4.

It is elementary law "that time and place ought to be repeated to every material fact."

Com. Dig., Indictment, G, 1.
1 Chitty Cr. L., 219.
S. *vs.* Brown, 24 S. C., 224.

"It is laid down as an undoubted principle in all the books that treat of this matter that no indictment whatsoever can be good without precisely showing a day and year of the material facts alleged in it."

Bac. Abr., Indictment, G, 4.

These are not mere matters of form and nicety of pleading. The allegation of *venue* as well as that of place is considered absolutely essential and *matter of substance.*

Reg. *vs.* O'Connor, 5 Q. B., 16, 31.

It is true the averment that a letter was placed or caused to be placed "in the post-office at Baltimore city" may be

held to imply an allegation of place, but even then the allegation of *venue* is at least imperfect, indirect, and inartificial. *Time*, however, is not averred, either directly or indirectly.

(*b*) Another radical defect in the indictment is the *want of certainty in not averring the person intended to be defrauded.* The allegations of supposed names of third persons are as follows:

"The Davis & Stevens Manf. Co., Seneca Falls, N. Y."

"Turner, Day & Woolworth Mfg. Co., 7th & Oak St., Louisville, Ky."

"Wrightsville Hardware Co., Wrightsville, Pa."

Record, pp. 2, 3.

This combination of letters, figures, and characters cannot be treated as an averment of any name or names. The meaning of the abbreviations here used can, of course, be *guessed* at; but a court will not supply omissions in a pleading (13), especially an indictment, in this mode. The indictment should be written in English in full, without abbreviations or figures. An indictment must not be drawn like a telegram or a commercial memorandum.

Berrian *vs.* S., 22 N. J. L., 9.

But even if the words presumably indicated in this shorthand method were written out in full the allegations would still be defective and insufficient. The words "Davis and Stevens Manufacturing Company," etc., are evidently not intended as the names of *individuals.* If they are intended to describe a *corporation*, the averment must be of the appropriate corporate name, with the addition "a body corporate" or words tantamount.

1 Chitty Cr. L., 214.

White *vs.* S., 24 Tex. App., 231.

If a *partnership* is intended, the names of the individuals composing the firm must be alleged.

Wallace *vs.* P., 63 Ill., 451.
McCowan *vs.* S., 58 Ark., 17.

An allegation in the form contained in the indictment in this case "*amounts, in a legal sense, to an entire absence of any averment as to the party intended to be injured.*"

P. *vs.* Schwartz, 32 Cal., 160, 165.

The question then arises, is the averment of the person injured (intended to be defrauded) essential to the description of the offense alleged in this case?

"No allegation which is descriptive of the identity of that which is essential to the charge in the indictment can be rejected * * * and the *names of the person on whom the offense is said to have been committed* must be proved according to the indictment."

McCrary *vs.* P., 45 N. Y., 153, 155.

The authorities place the requirement that the names of third persons injured must be alleged in the indictment upon the ground that it is a "*necessary attribute of certainty.*"

Spielman *vs.* S., 27 Md., 520, 524.
S. *vs.* Cadle, 19 Ark., 613.

What is the offense punished by section 5480 Revised Statutes? That the defendant having devised a scheme to defraud, to be effected by opening correspondence *with another person*, by means of the Post Office Establishment shall, in and for executing such scheme, place a letter in a post-office of the United States.

According to the natural and proper interpretation of this statute, giving due meaning to its entire language and effect to all its parts, an offense is thereby created having three essential elements which must co-exist in order to con-

stitute the offense: (1) that the defendant devised the scheme to defraud by means of the post-office; (2) that he deposited the letter; (3) that with the act of depositing was coupled an intent to defraud some person.

Durland *vs.* U. S., 161 U. S., 306, 315.

When subjected to a proper analysis, stripped of all useless verbiage, it will be found that this statute creates the offense of *placing a letter in a post-office with the intent to defraud another person.* The offense is in the nature of an attempt. It is immaterial that nothing was obtained, that no one was actually injured, that the means used were not actually adapted to the end proposed.

Durland *vs.* U. S., *supra.*

In its ultimate analysis the crime in this case will be found to fall within the definition of attempt—an intent to defraud coupled with an act towards accomplishing the fraud.

It has always been held that under statutes against false pretenses the name of the person from whom property was obtained and the name of *the person intended to be defrauded must* be alleged in the indictment.

2 Bishop New Cr. Proc., § 173 (3).

It was only by statute (24 and 25 Vict., ch. 96, § 88) that this requirement was taken away.

2 Bishop New Cr. L., § 413.

It is perfectly immaterial that the intent to defraud the particular person to whom the letter was addressed will (*as matter of proof*) be inferred from the fact of addressing and sending the letter.

If A is charged with an assault with an intent to murder B, the offense is sufficiently proved by showing that A without provocation assaulted B with a deadly weapon. Yet in *pleading,* according to all precedents, the words "with in-

tent the said B then and there * * * to kill and murder" are essential.

3 Chitty Cr. L., 828.

2. As to the Consolidation.

The indictment against the plaintiff in error charges the mailing of three letters, to "The Davis and Stevens Company," "Turner, Day and Woolworth Company," and "Wrightsville Hardware Company," respectively.

The indictment against Richard D. Uthoff charges the mailing of three letters, to "Messrs. Ratcliffe and Shaw," "Turner, Day and Woolworth Company," and "The Davis and Stevens Company," respectively.

The Cohen indictment charges the fraudulent scheme to be to convert the goods intended to be obtained "to his (Cohen's) own use and profit."

The Uthoff indictment charges the fraudulent scheme to be to convert the goods intended to be obtained to his (Uthoff's) own use and profit.

The letters set forth in the two indictments, although the persons addressed are the same in two instances, *are all different letters.*

The two indictments therefore undoubtedly contain *six different charges.*

The court below ordered the two indictments to be consolidated and tried together before one jury, and the plaintiff in error excepted (Record, pp. 5–8) and incorporated his objection in his first assignment of errors. (Record, p. 30.)

This action of the court below introduced endless confusion and was productive of the greatest hardship and injustice to this plaintiff in error. It is contended that the action was wholly unwarranted in law, at variance with all regular and received notions of criminal justice. It is literally unprecedented.

The indictment may severally charge offenses to the *number of three.*

U. S. Rev. Stats., § 5480.

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may properly be joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases the court may order them to be consolidated."

U. S. Rev. Stat., § 1024.

This provision evidently contemplates that the charges shall not only be similar, but that each separate charge shall be the same as to all the defendants. The precedents, both State and Federal, under statutes and at common law, are all that way.

Logan *vs.* U. S., 144 U. S., 263, 296.—An order of consolidation was at first passed as to nine indictments. This was subsequently set aside as to five indictments, and such a severance ordered as to the remaining four indictments (p. 268 of the Report) *that the defendants in all the indictments and the charge against every defendant in each indictment were identical.* (This case cites the three following cases.)

U. S. *vs.* Marchant, 12 Wheat., 480, simply holds that if several persons are arraigned *on the same indictment* and severally plead not guilty, it is at the election of the prosecutor either to take out joint venires against them all or several against each, thus giving the prosecutor an election whether there shall be a joint or several trial (pp. 482, 483, of the Report).

Ex parte Yarborough, 110 U. S., 651, 655.—Four indictments charged each and all the defendants with a conspiracy directed against a different person in each indictment—*i. e.*, the indictments differed from each other, but the charges against the defendants were *the same in each*

case as to all. The report simply states that the indictments were consolidated.

Withers *vs.* C., 5 S. & R., 59.—Two indictments *against one person*, each charging conspiracy to cheat and defraud one Hickman. The court sustained the consolidation upon the ground of the analogy of several counts in one indictment.

S. *vs.* Watts, 82 N. C., 656.—Two indictments *against one person.* One charged common assault and the other assault with intent to rape, evidently upon the same person. The jury found him guilty of the former and not guilty of the latter offense. The court evidently considered the proceedings erroneous, but held that the defendant had not been prejudiced, because the acquittal upon the one count placed the case in the same situation as if the indictment had contained but the one count of assault with intent to rape and the defendant had been found guilty of the lesser charge of assault included therein.

S. *vs.* McNeil, 93 N. C., 552.—Four indictments of two counts each against several defendants, the charges in each count of each indictment evidently being identical as to all. The court, upon motion of the State, treated them as if the several offenses charged in them had been embraced in one distinct indictment of eight counts, *but required the State to elect at the close of its testimony-in-chief upon which one of the several indictments a conviction would be asked.*

"This practice," said the court, "may be allowed, observing the restrictions mentioned, in the sound discretion of the court, but it ought to be done with caution and only in cases where the court shall be satisfied, from the peculiar circumstances of the case, that the due administration of criminal justice requires it, and, moreover, the court should be careful that the defendant suffers no prejudice from confusion or from evidence not pertinent to the charge insisted upon. This the court can guard against ordinarily by proper caution to the jury, and in case of a verdict of guilty that is

probably not warranted by the evidence by granting a new trial."

C. *vs.* Bickum, 153 Mass., 386, repudiates the entire doctrine as to consolidation as not authorized at common law.

The only English case in which anything approaching a consolidation was allowed seems to be R. *vs.* Wauklyn (R. *vs.* Vaughn), 8 C. & P., 290, a case of cross-indictments for assaults arising out of the same transaction. Gurney, B., directed the jury to be sworn in each traverse, the counsel for the prosecution in that which was entered first to open his case and call his witnesses, then counsel on other side to open his case and call his witnesses, no reply allowed on either side.

3. As to Refusal to Direct Verdict of Not Guilty.

The plaintiff in error, both at the close of the testimony-in-chief for the prosecution and of the whole case, offered prayers for directions to the jury upon the grounds that there was no legally sufficient evidence tending to prove:

(*a*) That one or more of the schemes to defraud alleged in the indictment was or were devised by the defendant, Max Cohen. (Defendant's instruction No. 1, Record, p. 21; defendant's instruction No. 15, Record, p. 25.)

(*b*) That the scheme or schemes mentioned in the indictments was or were intended by the defendant, Max Cohen, to be effected through a United States post-office. (Defendant's instruction No. 3, pp. 21, 22; defendant's instruction No. 16, Record, pp. 25, 26.)

(*c*) That the letter or letters alleged in the indictment was or were either placed or caused to be placed in the post-office at Baltimore city by the defendant, Max Cohen, for the purpose of executing said scheme or schemes mentioned in the

indictment. (Defendant's instruction No. 5, Record, p. 22; defendant's instruction No. 13, Record, p. 25.)

(*d*) That any letter averred in the indictment was placed or caused to be placed by the defendant in the post-office at Baltimore city. (Defendant's instruction No. 9, Record, p. 25.)

These instructions were refused, and the exception to this action of the court below is embraced in the third and fourth assignments of error. (Record, pp. 32–34.)

The record sets forth in substance the entire evidence in the case. (Record, p. 23, defendant's 12th bill of exceptions.)

The theory upon which the court below rejected these prayers and permitted the case to go to the jury can best be gathered from the language of the charge to the jury:

"The indictment charges that Cohen had devised a scheme to defraud. *Now, if he was aware* that Uthoff's scheme was a fraudulent one; that he (Uthoff) was using the United States mails in sending these letters in pursuance of a scheme to defraud, and he got into that scheme and sent the letters charged in the indictment against him, then he is as guilty as if he had devised it if he was a participant in it." (Record, pp. 27, 28.)

The general doctrine is undoubtedly sound that any degree of participation in a misdemeanor renders every participant liable as principal. The case seems to have been submitted to the jury upon the theory that Cohen *was an abettor of Uthoff*, and therefore liable as principal. There are two objections to this course arising out of the *pleadings* and the *evidence*.

There is absolutely not a scintilla of proof that Cohen either placed or caused a letter to be placed in the post-office. The only testimony at all connecting him with the case is the statement of Uthoff that Cohen as well as he indiscriminately *received* mail, and Cohen's testimony that he was em-

ployed by Uthoff at a weekly salary and conducted his correspondence. (Record, pp. 22, 23.)

In order to render Cohen liable as an accomplice of Uthoff it is necessary not only that he should have aided Uthoff by doing acts that conduced to the end had in view by Uthoff, but that he should have been aware of and participated in the latter's intent.

Reg. *vs.* Cruse, 8 C. & P., 541.
Wagner *vs.* S., 43 Neb., 1.

Now, what is the intent charged against Cohen? "To convert the said articles of merchandise to his (Cohen's *own*) *use and profit*" (Record, p. 2). And what is the intent charged against Uthoff? "To convert the said articles of merchandise to his (Uthoff's) *own use and profit*" (Record, p. 8). The intent, the *scheme* which the parties had in view is an absolutely essential ingredient of the crime charged.

Eliminate from the charge the formation of the scheme to defraud and no offense is described.

Durland *vs.* U. S., 161 U. S., 306, 315.

It is perfectly consistent with the guilt of each that they should have devised different schemes. Each may still be criminal, but the community of design is absolutely essential to their being accomplices. It is immaterial whether the parties *acted* together or performed separate parts at different times and places, provided the acts of each contributed to the criminal result, but the union or identity of criminal *design* is essential. It is not pretended in this case that Cohen was guilty save and as far as he abetted Uthoff.

The indictment may or may not be good without the words "to his own use and profit." It would be essentially defective if it did not set forth *a scheme and artifice to defraud.* The contrivance of a scheme to defraud is a necessary constituent element of the crime created by section 5480; that being the case, even assuming the words "to his own use and profit" are *necessary*, what is the rule?

The well-established elementary rule is "*that matters descriptive* of that which is legally essential to the *identity of the charge* must be proved as laid."

3 Russ. Cr., 9 ed., 307.

"And if such matter is set forth with unnecessary particularity, all the circumstances of the description must be proven as laid."

C. *vs.* Wellington, 7 Allen, 299.
C. *vs.* Luscomb, 130 Mass., 422.

A specific application of this rule is to be found in cases where *intent* is averred with unnecessary particularity.

C. *vs.* Harley, 7 Metc., 506.
C. *vs.* Kellog, 7 Cush., 473.
C. *vs.* Moore, 130 Mass., 45.
S. *vs.* Carroll, 13 Mont., 246.
Cf. Best. Ev., § 280.

4. As to Rulings on Question of Intent.

The defendant Uthoff testified that all goods ordered by him were ordered in good faith, with the intention of paying for them, and that the course of his business was to pay for goods bought by him (Record, p. 22). The plaintiff in error testified that he had no knowledge of the mailing of any of the letters referred to in evidence; that at the time of writing letters for Uthoff he acted in good faith, believing that Uthoff would pay for the goods received (Record, p. 22). Upon this evidence was based the following prayer:

"The mere fact that the defendant did not pay for goods alleged in the indictment to have been obtained by him is immaterial. The jury must in order to convict be satisfied by the evidence that the defendant's act of ordering goods was coupled with an intent or design not to pay for the same." ("Defendant's instruction No. 10," Record, p. 25.)

The court below refused this instruction and the defendant assigned this action as error. (Record, p. 33.)

The court also charged the jury that if the defendant wrote the letters "with the intention that they should be sent by mail, and they were so sent," then he was a participant in the scheme to defraud and this action was assigned for error. (Record, p. 28.)

It is submitted as an undoubted, almost self-evident proposition that with the act of mailing there must have concurred an intent thereby to defraud. While the intent need not be shown by distinct, substantive evidence, but may be inferred from the act of mailing under all the circumstances of the case, it is submitted that the plaintiff in error was entitled to a statement of law substantially to the effect that before the jury could convict they must find the truth of the allegation in the indictment "that the said Max Cohen, *devising and intending to defraud*, etc., *in and for executing said scheme and artifice*, etc., did place." By its instruction the court virtually told the jury that the intent accompanying the act of mailing was immaterial.

5. As to Rulings on Admissibility of Evidence.

Numerous exceptions were taken to rulings as to the admissibility of evidence. Only those rulings which the plaintiff in error deems of a most prejudicial character and unquestionably erroneous are here relied on. Most of this evidence relates to the conduct of the defendant Uthoff to the formation or contrivance of a fraudulent scheme by him; but as the entire theory of the defendant Cohen's criminal liability, as announced in the court's charge, was based upon his participation of that scheme, the evidence was none the less prejudicial to Cohen because it did not relate to his acts. The theory of the prosecution was that the acts of Uthoff were all in law imputable equally to Cohen. The testimony thus objected to consists principally of *hearsay* and *opinion* evidence.

(*a*) William F. Focke was allowed to testify that a *great many people called at his office to inquire for Uthoff*. The context in which this statement appears and a comparison with other testimony introduced by the prosecution make it apparent that the object of this testimony was to show that Uthoff (consequently also Cohen) was engaged in a fraudulent enterprise and *kept out of the way of people, secreted himself*. That "a great many people called to inquire for Uthoff" is equivalent in this connection to a statement that a great many people said or declared that they had tried to find him, but were unable to do so. The very question to which this answer was given shows this: "How much was Uthoff in his office?"

Record, pp. 12, 13.

(*b*) Frank N. Stevens was allowed to testify that a number of persons *told* him that goods of the kind which Uthoff and Cohen were alleged to have fraudulently obtained could be bought in Baltimore for less than it cost to manufacture them (Record, pp. 14, 15). The insinuation sought to be conveyed by this testimony was, of course, that the goods could be bought from Uthoff.

(*c*) H. C. Bernstock produced an advertisement purporting to be that of R. D. Uthoff, soliciting correspondence with tanners and curriers who desired new fields for their output. The advertisement consisted of a printed slip, which the witness stated he had cut from a publication called the "Harness Gazette." This slip, without anything to connect Cohen or Uthoff with it, was permitted to be read in evidence. (Record, p. 17.)

(*d*) J. A. Weston, whose firm had shipped goods to Uthoff, came to Baltimore to find Uthoff and demand payment. The witness did not know Uthoff, but was permitted to state that "a party" pointed out "another party" whom the witness "concluded" to be Uthoff. The witness was

then allowed to tell a tale of that "party's" going into a store which he "judged to be Polish" and failing to come out again, the entire purport of the evidence being that the "party" was probably Uthoff, and was endeavoring to escape from notice or observation (Record, pp. 19, 20). How far the verdict was brought about or influenced by this kind of evidence it is impossible to tell. It is sufficient that its introduction was utterly at variance with fundamental rules of evidence.

(*e*) J. H. Duer testified that Uthoff offered to sell certain articles of merchandise below the regular market price. The witness was then allowed further to testify that a third person *told* him, witness, that he had purchased from "a stranger" three pieces of artificial leather at about one-half the factory price. The evident object of this hearsay testimony was to create the influence that the "stranger" was Uthoff, and that he (and consequently Cohen) engaged in a scheme to defraud. (Record, p. 20.)

(*f*) Equally improper, it is claimed, was the testimony of the collectors Musgrave and Hardcastle (Record, pp. 20, 21) to the effect that persons had placed claims in their hands against Uthoff, and that the two records of the courts and of their collection offices "showed" that there were a great many claims outstanding against Uthoff. By what possible stretch of ingenuity can even a semblance of justification be attached to the admission of such evidence? All distinction between relevant and irrelevant, between hearsay and knowledge, seems to be lost sight of here.

6. As to Rulings on Testimony as to Character.

The court below charged the jury that the evidence of the defendant's good character could only be considered in *case of doubt*, but if the "*proof*" in the case was sufficient, if "facts" were proven, evidence of good character was of no avail; that good reputation is added to the general presumption which attends a man when he is accused of crime *until the proof is sufficient to satisfy you of the facts which constitute his guilt* (Record, p. 27). Two fundamental errors are embraced in this direction, as to the effect of *evidence of character* and as to the nature and operation of the *presumption of innocence.*

(*a*) The instruction as to the effect of evidence of good character embodies the fallacy and paradox that if the proof is of such a weak nature that the jury are bound to acquit—that is, in a case of doubt—then they may "consider" the evidence of character. The other evidence would justify a conviction. They must ignore such character evidence and not suffer it to operate in connection with the entire proof. In plain words, the doctrine is here announced that evidence of character is admissible, but no effect is to be given to it except in cases where its consideration would be of no benefit.

"The best cases now wholly support the author's (Greenleaf's) statement, that evidence of good character must be considered in all cases."

3 Greenl. Ev., 15 ed., § 25, p. 33, n. *a.*

The overwhelming weight of reason and authority supports the proposition that evidence of good character is to be weighed and considered in connection with all the other evidence in a criminal case *and may of itself create the reasonable doubt* which entitles the accused to an acquittal.

The vice of such a charge as that given in this case is that if the other evidence is such as to raise a reasonable doubt the jury are bound to acquit, so that this is to give the evidence of good character no weight whatever.

Hanney *vs.* C., 116 Pa. St., 327.
C. *vs.* Cleary, 135 *ib.*, 84.
C. *vs.* Leonard, 140 Mass., 473.
Remsen *vs.* P., 43 N. Y., 6.
P. *vs.* Friedland, 2 N. Y. App. Div. R., 332.
P. *vs.* Jassino, 100 Mich., 536.

(*b*) The instruction embodies the further error that the presumption of innocence is not of itself proof, but only stands until the *proof* satisfies the jury of the guilt of the accused.

The presumption of innocence means much more than is here accorded to it. The enforcement of the principle embodied in this presumption "lies at the foundation of our criminal law."

Coffin *vs.* U. S., 156 U. S., 342, 453.

This presumption is not to be distinguished from "proof;" it is of itself in every case *evidence in favor of the accused.*

Ib., p. 459.

This presumption continues, not, as stated in the charge, "until the proof satisfies the jury of the facts which constitute guilt," but "it starts with the charge at the beginning of the trial and goes with the accused until the determination of the case."

U. S. *vs.* Reder, 69 Fed. R., 965, 969.

Accordingly, an instruction to a jury that the presumption of innocence goes with the accused "all through the case until it is submitted to you" was held erroneous.

"The presumption of innocence," said the appellate court, "does not cease upon the submission of the cause to the jury, but operates in favor of the defendant, not only during the taking of the testimony, but during the deliberations of the jury until they have arrived at a verdict."

P. *vs.* McNamara, 94 Cal., 509, 514.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

MAX COHEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 485.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

MAX COHEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 485.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

Max Cohen, plaintiff in error, was indicted upon a charge of using the mails with intent to defraud under § 5480 of the Revised Statutes. One Richard D. Uhthoff was also indicted for the same crime. The indictment against Cohen charged him with having acted in connection with Uhthoff. They were tried together before Judge Morris and a jury, and convicted February 7, 1896. Each obtained a writ of error. § 5480, so far as material, is as follows:

> If any person, having devised or intending to devise any scheme or artifice to defraud, * * * to be effected by * * * opening * * * correspondence or communication with any other person, whether resident within or outside of the United

> States, by means of the Post-Office Establishment of the United States, * * * shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter * * * in any post-office, or branch post-office, or street or hotel letter box of the United States, to be sent or delivered by the said Post-Office Establishment, * * * such person so misusing the Post-Office Establishment shall, upon conviction, be punishable. [etc.]

Error is confessed upon one of the points raised at the trial. As, however, objections are made to the indictment, which will of necessity come up again upon the second trial, a brief is submitted on behalf of the Government upon this writ of error.

THE INDICTMENT.

The indictment charges the following fraudulent scheme (p. 2):

> He, the said Max Cohen, then and there intended to obtain from divers manufacturers and merchants divers articles of merchandise, to be sent by said manufacturers and merchants to a certain Richard D. Uhthoff, whom the said Cohen falsely represented to be an importer, exporter, and jobber, and a dealer in wholesale supplies for factories, dealers, etc., the said articles of merchandise to be obtained from the manufacturers and merchants aforesaid by the false pretence made to them by the said Max Cohen that they should be paid for the same by the said Richard D. Uhthoff, he, the said Max Cohen, then and there well knowing and believing that the said manufacturers and merchants would not in truth and fact be paid by the said Uhthoff, and then and there con-

> triving and intending fraudulently to convert the said articles of merchandise to his own use and profit.

This "scheme or artifice to defraud divers persons" is alleged to have been devised by Max Cohen on March 4, 1895, to be effected by opening correspondence and communication with the intended victims by means of the Post-Office Establishment of the United States, etc.

The indictment alleges an overt act as follows (p. 2):

> That the said Max Cohen, devising and intending to defraud in the manner aforesaid the Davis & Stevens Manufacturing Company, in and for executing the said scheme and artifice unlawfully, knowingly, and wrongfully did place and cause to be placed in a post-office of the United States, to wit, in the post-office at Baltimore City aforesaid, a certain letter addressed to "The Davis & Stevens Manf. Co., Seneca Falls, N. Y.," to be sent and delivered by the said Post-Office Establishment; which said letter is of the following tenor, to wit: [Here follows a letter to said company, dated March 5, 1895.]

Two similar letters are also set forth in the same count, one to the Turner, Day & Woolworth Manufacturing Co., 7th and Oak sts., Louisville, Ky., dated July 6, 1895; the other to the Wrightsville Hardware Co., Wrightsville, Pa., dated July 10, 1895.

A demurrer to the indictment was filed and overruled (pp. 4–5). This demurrer failed to state the grounds of objection. No specification of the objections appears to have been made until the filing of the assignments of errors, when it was objected that the averments as to the persons addressed, in the three letters set forth in the indictment, are insufficient.

The applicability of § 5480 to cases like the present was settled in *Durland* v. *United States*, 161 U. S., 306; and the indictment in this case is more specific than the one there under consideration.

No complaint based upon defects in form can be made in an appellate tribunal; for § 1025 of the Revised Statutes provides as follows:

> No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

This section makes no reservation on behalf of formal defects, to which attention is called by the demurrer. Of course the court may, in its discretion, quash an informal indictment, and require a proper one to be drawn, but it is submitted that this section makes all such questions discretionary and unreviewable. In *Connors* v. *United States*, 158 U. S., 408, 411, the court say:

> Nor, if made *by demurrer* or by motion and overruled, would it avail on error, unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed.

Speaking of an indictment under the National Banking Law, in *Cochran* v. *United States*, 157 U. S., 286, 290, Mr. Justice Brown says:

> But the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offence intended to be charged, and sufficiently apprises the defendant of

> what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

In *Babcock* v. *United States*, 34 Fed. Rep., 873, 876, Mr. Justice Brewer tested an indictment as follows:

> Can anything be clearer than that the defendant knew precisely what he was charged with and that there was no doubt and uncertainty in the matter?

To the same effect is *Stokes* v. *United States*, 157 U. S., 187, 191.

The point here made seems to be that there is no allegation to the effect that the addressees of the letters in question were corporations. Presumably they were corporations from their names. If, however, they were partnerships or individuals trading under the name of corporations the effect would be the same. Defendant could not possibly have been prejudiced or misled in any manner. It would not even have been necessary to plead the names of the addressees correctly. (*Putnam* v. *United States*, 162 U. S., 687, 690.) The strict technicalities of common-law criminal pleading, upon which this defendant relies, are the very mischiefs which § 1025 of the Revised Statutes was enacted to remedy.

In the brief filed on behalf of the plaintiff in error it is claimed that the abbreviations "N. Y.," "Ky.," etc., are not sufficient for the purposes of pleading, and impliedly contended that the indictment should contain an innuendo stating that the initials meant New York, Kentucky, etc., respectively. This is another of the ancient trivialities which § 1025 put out of date.

It is also complained that the indictment does not expressly state that the letter to the Davis & Stevens Manufacturing Co. was intended for the purpose of defrauding that company, and that a similar statement was not repeated with relation to each of the other corporations to whom letters were addressed. It is clear enough from the whole indictment that the addressee of each fraudulent letter was the person intended to be defrauded by that letter. There is no possibility of mistake as to this. The slight inartificiality of the indictment in this respect is similar to those disregarded by the court in *Cochran* v. *United States*, 157 U. S., 286; *Rosen* v. *United States*, 161 U. S., 29; *Durland* v. *United States*, 161 U. S., 306, and similar cases.

Since the assignment of errors was filed, defendant's counsel has discovered another inartificiality in the indictment, namely, the absence of an express averment, as to each letter, that it was sent on the day of its date. It is true that as a rule "time is important, and some reasonable averment of it is generally necessary" (1 Bish. New Crim. Proc., § 390); but even if a specific demurrer to the present indictment would have been sustainable at the outset, this is clearly an objection not available after defendant has pleaded on the merits. It is respectfully submitted that the date on the letter sufficiently shows when the letter was mailed. That the objection related to form only, not to substance, is shown by the fact that the District Attorney would not have been bound by the date in the indictment had he averred it with all the precision which counsel demand. (1 Bish. New Crim. Proc., §§ 400, 401; *United States* v. *Le Baron*, 4

Wall., 642, 648; *United States* v. *Matthews*, 68 Fed. Rep., aff. 161 U. S., 500.) Wherever a variance is immaterial, there certainly the averment is matter of form.

Mr. Bishop says (1 Bish. New Crim. Proc., § 391, quoting 1 Stark. Crim. Pl., 2nd ed., 55):

> From the whole allegation, "if the day and year can be collected," the indictment, says Starkie, will be good, "though they be not expressly averred."

CONFESSION OF ERROR.

We are unable to find any authority for the action of the court in proceeding to try the indictment against this defendant at the same time and before the same jury as the indictment against Uhthoff. The two indictments were for separate crimes, although found by the jury to be in pursuance of the same fraudulent scheme. The consolidation of indictments for the purposes of the trial is permitted by the Revised Statutes only when the indictments are against the same person. (Rev. St., § 1024; see 1 Bish. New Crim. Proc., §§ 1042, 1043.) The joint trial could not have prejudiced Uhthoff, but may have seriously prejudiced Cohen.

OTHER EXCEPTIONS.

These bills of exceptions present many questions which, however, are not likely to come up again in the same way upon another trial. They are, moreover, very defective in their presentation of the case and of the questions involved.

For these reasons, no argument upon them is submitted.

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